

N. 2819

No. 13658

United States
Court of Appeals
For the Ninth Circuit.

ser vol. 2820

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 496)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAY 14 1953

No. 13658

United States
Court of Appeals
For the Ninth Circuit.

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 496)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on.....	1414
Notice of.....	57
Order Granting Stay of Payment of Fine Pending Determination of.....	60
Petition for Stay of Payment of Fine Pending Determination of.....	58
Statement of Points to Be Relied Upon on and Designation of Record on.....	1418
Stipulation Relative to Exhibits and Record on	1416
Appellant's Statement of Points to Be Relied Upon on Appeal and Designation of Record on Appeal.....	1418
Certificate of Clerk to Transcript of Record on Appeal	1414
Defendant's Instructions Given.....	36
Defendant's Instructions Refused as Covered by the Court or Otherwise Inapplicable.....	45
Indictment	3

	INDEX	PAGE
Judgment and Commitment.....		54
Motion for New Trial.....		52
Minute Entries:		
March 11, 1952.....		7
April 8, 1952.....		7
September 19, 1952.....		8
September 22, 1952.....		9
September 23, 1952.....		10
October 8, 1952.....		11
October 10, 1952.....		12
October 14, 1952.....		14
Names and Addresses of Attorneys.....		1
Notice of Appeal.....		57
Order Granting Stay of Payment of Fine Pending Determination of Appeal.....		60
Petition for Stay of Payment of Fine Pend- ing Determination of Appeal.....		58
Plaintiff's Instructions Given.....		15
Plaintiff's Instructions Refused as Covered by the Court or Otherwise Inapplicable.....		23
Reporter's Transcript.....		61
Arguments in Closing.....		1230
Instructions to the Jury.....		1374
Proceedings on Judgment and Sentence...		1411

	INDEX	PAGE
Witnesses, Defendant's:		
Busby, Virginia		
—direct		842
Carroll, Clifford F.		
—direct		303, 598
—cross		600
Hellman, Roland D.		
—direct		577, 590, 608, 648, 687, 711, 886, 892, 912, 950, 1222
—cross		940, 978, 1020, 1058, 1224
—redirect		1068
Hyman, Arthur		
—direct		878
—cross		883
Lerman, Morris		
—direct		1142
—cross		1147
Lorenzen, Hiram A.		
—direct		342, 1077
—cross		1080
Manger, Vera		
—direct		823
—cross		828
—redirect		840

INDEX	PAGE
Witnesses, Defendant's—(Continued):	
Olender, Milton H.	
—direct	326, 345, 398, 429
—cross	433, 471
—redirect	496, 509, 543, 562, 573, 589, 603, 751, 862, 874
—recross	546, 559, 572, 606, 774, 797, 846
Reinhard, S. E.	
—direct	310
—cross	317
Terrana, Mike	
—direct	644
Widrin, Ella	
—direct	306
—cross	309
Witnesses, Government's:	
Blanchard, Medbury	
—direct	175
Cahn, Monroe L.	
—direct	98
Cardoza, Lenus	
—direct	187
Carroll, Clifford F.	
—direct	1150
—cross	1162
—redirect	1165

INDEX

PAGE

Witnesses, Government's—(Continued):

Davis, Virginia	
—direct	99
Doran, James J.	
—direct	173
Gahura, William F.	
—direct	937
Harley, Truman H., Jr.	
—direct	178
—cross	183
Horne, George	
—direct	74
—cross	77, 81
—redirect	82
—recross	83
Jensen, Donald A.	
—direct	1120
—cross	1140
Leavy, Lewis	
—direct	189, 216
—cross	194
—redirect	197
—recross	198
McNab, R. L.	
—direct	929
—cross	934

INDEX	PAGE
Witnesses, Government's—(Continued):	
Micheli, Helen	
—direct	170
—cross	171
Mooser, Louis H., Jr.	
—direct	70, 108, 1167
Mytinger, Hubert C.	
—direct	261, 1206
—cross	275, 1071, 1211
—redirect	1076, 1213, 1217
—recross	1216
Neiden, Benjamin H.	
—direct	90
—cross	96
—redirect	97
Ringo, Charles R.	
—direct	112, 127
—cross	137
—redirect	150, 163
—recross	168
Root, Seth L.	
—direct	218, 224, 1168
—cross	229, 1169
—redirect	229, 230, 1172, 1175
—recross	230, 1174
Saraga, Moe	
—direct	199
—cross	212

INDEX

PAGE

Witnesses, Government's—(Continued) :

Whiteside, Melbourne C.

—direct 234, 1084, 1098

—cross 240, 246, 1103

—redirect 244, 249, 255, 258, 1115

—recross 256, 259, 1119

Stipulation Relative to Exhibits and Record

on Appeal 1416

Order Re 1418

Verdict 52

NAMES AND ADDRESSES OF ATTORNEYS

LEO FRIEDMAN,
Russ Building,
San Francisco, California,
Attorney for Appellant.

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney;

ROBERT J. DREWES, ESQ.,
Assistant United States Attorney,
Attorneys for Appellee.

United States District Court, Northern District of
California, Southern Division

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON H. OLENDER,
Defendant.

INDICTMENT

Violation of Section 145 (b), Internal Revenue
Code; Title 26 U.S.C., Section 145 (b), Eva-
sion of Income Tax.

Penalty: Imprisonment not to exceed five years, or
fine not to exceed \$10,000, or both, on each
count, with costs of prosecution.

First Count

The grand jury charges:

That on or about the 15th day of March, 1946, in
the Northern District of California, Milton H.
Olender, late of Oakland, California, did wilfully
and knowingly attempt to defeat and evade a large
part of the income tax due and owing by him to the
United States of America for the calendar year
1945, by filing and causing to be filed with the Col-
lector of Internal Revenue for the First Internal
Revenue Collection District of California, at San
Francisco, California, a false and fraudulent income
tax return wherein he stated that his net income for
said calendar year, computed on the community-
property basis, was the sum of \$21,096.38, and that
the amount of tax due and owing thereon was the

sum of \$7,931.86, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$34,553.69, upon which said net income he owed to the United States of America an income tax of \$16,478.92.

Second Count

The grand jury charges:

That on or about the 15th day of March, 1946, in the Northern District of California, Milton H. Olender, late of Oakland, California, who during the calendar year 1945 was married to Bessie B. Olender, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Bessie B. Olender to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax return for and on behalf of the said Bessie B. Olender, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$19,971.23, and that the amount of tax due and owing thereon was the sum of \$7,563.89, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community-property basis, was the sum of \$33,428.53, upon which said net income there was owing to the United States of America an income tax of \$16,038.82.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Third Count

The grand jury charges:

That on or about the 15th day of March, 1947, in the Northern District of California, Milton H. Olander, late of Oakland, California, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$12,514.81, and that the amount of tax due and owing thereon was the sum of \$3,054.85, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$23,778.72, upon which said net income he owed to the United States of America an income tax of \$8,368.44.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Fourth Count

The grand jury charges:

That on or about the 15th day of March, 1947, in the Northern District of California, Milton H. Olander, late of Oakland, California, who during the calendar year 1946 was married to Bessie B. Olander, did wilfully and knowingly attempt to defeat and

evade a large part of the income tax due and owing by the said Bessie B. Olender to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax return for and on behalf of the said Bessie B. Olender, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$10,999.81, and that the amount of tax due and owing thereon was the sum of \$2,507.94, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community-property basis, was the sum of \$22,263.71, upon which said net income there was owing to the United States of America an income tax of \$7,553.94.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

A true bill.

/s/ SIDNEY H. KESSLER,

Foreman.

/s/ CHAUNCEY TRAMUTOLO,

United States Attorney.

Approved as to form:

/s/ R.J.D..

Presented in open court and Ordered [Endorsed]:
Filed February 27, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 11, 1952

This case came on regularly this day for arraignment. Robert J. Drewes, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Milton H. Olender, was present in proper person and with his attorney, John V. Lewis, Esq.

On motion of Mr. Drewes, the defendant was called for arraignment. Defendant stated his true name to be as contained in indictment. Mr. Lewis waived the reading of the indictment and advised the Court that the defendant had heretofore received copy. The substance of the charge was stated to defendant and defendant stated that he understood the charge against him.

After hearing counsel, ordered case continued to April 8, 1952, to plead.

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 8, 1952

This case came on regularly this day for entry of plea. Robert J. Drewes, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Milton H. Olender, was present in proper person and with his attorney, John V. Lewis, Esq.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty"

to the indictment filed herein against him, which said plea was ordered entered.

After hearing counsel, ordered case continued to May 6, 1952, to be set for trial.

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 19, 1952

This case came on regularly this day for further trial, the parties hereto and the jury impaneled herein being present.

* * *

In the absence of the jury, the Court discussed with counsel the letter of Dr. Jesse O. Halpern on behalf of George Goodman, which had been presented to the Court by Mr. Drewes. It is Ordered that the letter be made a part of the record.

The United States thereupon rested its case.

In the absence of the jury, Mr. Lewis made objection to the net worth value approach in this case. Ordered objection overruled.

Mr. Lewis renewed his objection to the testimony of Charles R. Ringo, which objection was Ordered overruled.

Mr. Lewis' motions to strike the testimony of Charles R. Ringo and for judgment of acquittal were Ordered Denied.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 22, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

* * *

Mr. Hagerty made a motion to strike certain of the testimony of defendant's witness, S. E. Reinhard, which motion was ordered granted.

Mr. Hagerty made a motion for a mistrial based on a charge of misconduct on the part of Mr. Drewes and that Mr. Drewes asked a prejudicial question of defendant's witness, S. E. Reinhard, which motion was Ordered denied.

Upon stipulation that Monroe Friedman would testify to what is set forth in his affidavit, marked as Defendant's Exhibit D, in event he were called to testify, Ordered that the subpoena issued therein be discharged.

In the absence of the jury, Mr. Hagerty and Mr. Drewes discussed with the Court the properness of asking certain types of questions of character witnesses.

In the absence of the jury, Mr. Hagerty re-offered Defendant's Exhibit F, heretofore marked for identification, said exhibit being introduced in evidence. Mr. Drewes objected thereto. After hearing counsel thereon, the Court reserved its ruling.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 23, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

In the absence of the jury the following took place:

Mr. Drewes further advanced his contention that the Government is entitled to ask a certain type of question of character witnesses. After discussion by Mr. Drewes and Mr. Hagerty, Mr. Drewes thereupon withdrew his insistence thereon.

Mr. Drewes and Mr. Lewis then discussed with the Court certain items of the stipulation marked U. S. Exhibit No. 15.

Mr. Drewes renewed his motion to strike the testimony of defense witness, Hiram Lorenzen, which motion was Ordered denied.

The Court sustained Mr. Drewes' previously made objection to the introduction into evidence of Defendant's Exhibit F, heretofore marked for identification.

* * *

In the absence of the jury, Mr. Hagerty renewed his motion to strike the testimony of United States witness, Charles R. Ringo, on the ground of privilege between attorney and client. After hearing Mr. Hagerty and Mr. Drewes thereon, Ordered said motion denied.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 8, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

In the absence of the jury, Mr. Hagerty made motions for mistrial:

(a) On the ground that admission of evidence as to Laura Foot is prejudicial;

(b) On the ground that admission of testimony of Charles R. Ringo violates privileged and confidential relationship between attorney and client.

Mr. Hagerty made additional motion to strike from the record the testimony of Seth L. Root in relation to the Goodman transaction in certain particulars.

Mr. Hagerty then made a motion for judgment of acquittal, and that failing, a motion for judgment of acquittal on the 1946 count.

After hearing counsel, it is Ordered that each and several of the motions be and the same are hereby denied.

Upon stipulation, it is Ordered that the Government's supplemental instruction be amended.

At the request of Mr. Drewes, the Court reopened presentation of evidence and admitted into evidence U. S. Exhibit No. 67, which had been offered at the close of the previous day's session but which had not been marked pending noncompliance with the

direction of the Court to have same signed and attested.

Mr. Drewes started his opening argument to the Court and jury on behalf of the United States.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 10, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

After argument by counsel and the instructions of the Court to the jury, in the absence of the jury, counsel noted their exceptions to the instructions in certain particulars.

At 2:25 p.m. the jury retired to deliberate upon its verdict.

Mr. Hagerty then renewed his previously made motions for mistrial, to strike certain of the testimony, and for judgment of acquittal. Ordered each and several of said motions again denied.

At 5:17 p.m. the jury returned into Court to have certain portions of the transcript of testimony read to jury.

At 5:32 p.m. the jury again retired to further deliberate upon its verdict.

At 5:42 p.m. the jury returned into court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered filed and recorded, viz:

“We, the Jury, find as to Milton H. Olender, the defendant at the bar, as follows:

Guilty as to Count 1;

Guilty as to Count 2;

Guilty as to Count 3;

Guilty as to Count 4.

/s/ “EDWARD C. CHEW,
“Foreman.”

The jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. Upon the Court’s own motion, the jury was polled in compliance therewith, and the verdict was found to be unanimous.

The Court thereupon discharged the jury until further notice.

Mr. Hagerty then made motions for judgment of acquittal, notwithstanding the verdict, and for a new trial. The Court ordered that this case be continued to October 14, 1952, at 10 o’clock a.m. for hearing of the motions, and indicated that it would entertain Mr. Hagerty’s motion for probation at that time.

In the interim Mr. Hagerty is to present formal motions for judgment of acquittal, notwithstanding the verdict, and for a new trial.

Ordered that Mr. Hagerty’s motion that defendant be permitted to remain at large on bail previously posted be Granted.

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 14, 1952

This case came on regularly this day for hearing of motions for judgment notwithstanding verdict and for a new trial. Robert J. Drewes, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Milton H. Olender, was present in proper person and with his attorneys, Emmett Hagerty, Esq., and John V. Lewis, Esq.

After hearing Mr. Hagerty and Mr. Drewes, Ordered motions for judgment notwithstanding verdict and for new trial be, and each is hereby, Denied.

On motion of Mr. Hagerty and with consent of Mr. Drewes, Ordered case referred to Probation Officer for investigation and report. John A. Sprague, Probation Officer, was present.

Ordered that defendant may remain at large on bail previously posted.

Ordered case continued to November 10, 1952, for judgment.

[Title of District Court and Cause.]

PLAINTIFF'S INSTRUCTIONS GIVEN

Dated: October 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Instruction No. 4

The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

United States v. Alphonse Capone,
56 F. 2d 927.

Instruction No. 5

You are instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.

Bell v. United States,
185 F. 2d 302, 309 (CCA-4).

Instruction No. 6

If you find that the defendant had substantial taxable income for the years 1945 or 1946, or in both years, which he did not report on his income tax

return, then you will find that there was a substantial amount of tax due to the United States Government for those years by the defendant. The same principle applies to the counts involving Mrs. Betty Olender's taxes.

Instruction No. 7

If the defendant intentionally handled his income so as to avoid making an accurate record of such income and then filed a return which to his knowledge substantially understated his income, and the tax-evasion motive played any part in such conduct, the offense charged may be made out even though the conduct may also have served other purposes, such as concealment of other wrong doing.

Spies v. United States,
317 U.S. 492, 63 S. Ct. 364 (1943).

Instruction No. 8

The duty to file the return is personal, and it cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else.

United States v. Beard,
(U.S.D.C., Md.), Crim. No. 14454.

Instruction No. 9

You are instructed that it is not necessary for the Government to offer direct proof of wilfulness.

It is a rare case in which the defendant has said to a witness that he did certain acts with the purpose of evading his tax liabilities.

In making your decision, therefore, as to whether or not the acts tending to conceal defendant's true tax liability were wilful, you may consider all the circumstances of the case. You may infer wilfulness from the kind of evasion, if any, which you find defendant committed, from his opportunity to know the true amount of his net income, and from such other facts which point to the existence or nonexistence of the criminal state of mind in the defendant.

Paschen v. United States,
70 F. 2d 491 (CCA 7) at p. 498;

Maxfield v. United States,
152 F. 2d 593 (CCA-9) at p. 597.

Instruction No. 10

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observations and knowledge to things that are put out in the open and are obvious to him, and say, "I have no knowledge of those facts." He must exercise such intelligence as he has, and, if the evidence shows that he intended to conceal tax liabilities from the Government, then of course he was not acting in good faith. This question of intent is a question you must determine

for yourselves from a consideration of all the evidence.

United States v. Paschen,
70 F. 2d 491 (CCA-7, 1934).

Instruction No. 13

It is not necessary for the Government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving and that he wilfully attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment.

Maxfield v. United States,
152 F. 2d 593 (CCA-9);

Rose v. United States,
128 F. 2d 623, 626 (CCA-10), 1942; certiorari denied (1942), 317 U.S. 651, 63 S.Ct. 47;

United States v. Schenck,
126 F. 2d 702, 704 (CCA-2), (1942);

Tinkoff v. United States,
86 F. 2d 868, 878 (CCA-7, 1937), certiorari denied (1937), 301 U.S. 689, 57 S.Ct. 795. Rehearing denied (1937), 301 U.S. 715, 57 S.Ct. 937.

Instruction No. 14

The gist of the offense charged in the indictment is wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two elements: (1) An intent to evade or defeat the tax, and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the years 1945 and 1946, or either of them, he had an income which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such years and which he knew it was his duty to state in his return for such years.

There are various schemes, subterfuges, and devices that may be resorted to, to evade or defeat the tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the de-

fendant. The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

Guzik v. United States,
54 F. 2d 618 (CCA-7), certiorari denied,
285 U.S. 545; Section 145 (b), IRC.

Instruction No. 16

In determining the honesty of a defendant's intentions, you may weigh his own statements on the one hand as against his actions and conduct on the other hand.

United States v. Freeman,
167 F. 2d 786 (7th Cir., 1948).

Supplemental Instruction No. 16-A

There has been testimony in this trial which, if believed by you, would warrant you in finding that the defendant, Milton Olender, asserted at the trial a much more detailed recollection of transactions with George Goodman than he had admitted on earlier occasions. If you should find as a fact that such is the case, you are warranted in considering this fact in determining the truth or falsity of the defendant's account at the trial with respect to the Goodman transactions.

United States vs. Hornstein,
176 F. (2d) 219.

Instruction No. 26

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits, and other matters required to be shown in any income tax return.

Section 54 of the Internal Revenue Code, as implemented by Regulations 111, Section 29.54-1.

Instruction No. 29

You have heard expert testimony relating to the issues involved in this case. I charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your consideration. You are not bound by the computations or other testimony of an expert witness, but you should give such testimony the weight to which you determine it is entitled in the light of the other proof in the case and also with reference to your conclusions as to whether or not the facts, on which the particular expert's testimony was based, have been established by the necessary degree of proof.

Instruction No. 30

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but

if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as, in the opinion of the Commissioner, does fairly reflect the income.

The Government is authorized by law, when the books are found to be inadequate, to adopt a reasonable method of ascertaining income. And so in this case, it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.

If, at the end of the year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, unless he got it by gift or inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.

Charge of the Court in *United States v. Flaccomio*, D.C., Md.

Instruction No. 31

The Government has placed before you evidence relating to the defendant's net worth at the end of the years 1945 and 1946. A defendant's net worth for a given year is the difference between all of his assets and all of his liabilities. Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the defendant's taxable net income by this method

you should add the defendant's living expenses for that year and the income taxes which he paid during that year to the increase in net worth. These expenditures should be added because they are not represented in the assets which the defendant has accumulated and are not deductible expenses. If you find that the defendant had an increase in net worth for the years 1945 and 1946 and also had a business or calling of a lucrative nature, there is most potent testimony that the defendant had income for those years, and, if the amount exceeds exemptions and deductions, then that income is taxable.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S INSTRUCTIONS REFUSED AS
COVERED BY THE COURT OR OTHER-
WISE INAPPLICABLE

Dated October 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Instruction No. 1

(It is requested that the Court give its usual instructions upon the following subjects:)

1. Province of court and jury.
2. Effect of indictment.

3. Presumption of innocence, and burden of proof.
4. Duration of presumption of innocence.
5. Presumption that one intends natural consequence of acts.
6. Credibility of witnesses.
7. *Falsus in uno, falsus in omnibus.*
8. Oral admissions (if instruction requested by accused.)
9. Failure of accused to testify (if instruction requested by accused.)
10. Weighing testimony of accused, and interest of accused.
11. Effect of evidence of good character (if applicable to evidence).
12. Arguments of counsel.
13. Duty to construe instructions as a whole.
14. Circumstantial evidence.
15. Admissions against interest.
16. Penalties the province of the Court alone.
17. Minor discrepancies.

Instruction No. 2

“The proof in a criminal case need not exclude all doubt. If that were the rule, crime would be punished only by the criminal’s own conscience, and organized society would be without defense against the conscienceless criminal and against the weak, the cowardly and the lazy who would seek to live on their wits. The proof need go no further than reach that degree of probability where the

general experience of men suggests that it has passed the mark of reasonable doubt.”

Henderson v. United States,

143 F. (2d) 681, at p. 682;

United States v. Henry von Morpurgo,

(N.D. Cal., 33021); Murphy, J.

Instruction No. 3

To establish its case the Government must prove:

(1) That income tax was due and owing in addition to that declared by the defendant on his original income tax return; and

(2) That the defendant wilfully attempted to evade and defeat such tax.

In order to find the defendant guilty, you must be convinced beyond a reasonable doubt from all the evidence submitted, of the guilt of the defendant of the crime with which he is charged. You must be convinced both that a tax was due and owing in addition to that declared on his return and that the defendant wilfully attempted to evade and defeat such tax.

United States v. Schenck,

126 F. 2d 702 (CCA 2d, 1942);

United States v. Miro,

60 F. 2d 58 (CCA 2d, 1932);

Gleckman v. United States,

80 F. 2d 394 (CCA 8th, 1935); certiorari denied (1936), 297 U.S. 709, 56 S.Ct. 501;

O'Brien v. United States,

51 F. 2d 193 (CCA 7th, 1931).

Instruction No. 11

On the question of intent to evade, and just by way of illustration and not by way of limitation, there are certain matters which you could consider pointing to intent so far as tax evasion is concerned if you found they existed in this case. These are general illustrations: Keeping a double set of books, making false entries in the books, altering invoices, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal. And if the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose.

Lustig v. United States,
163 F. 2d 85 (CCA 2);

Spies v. United States,
317 U.S. 492.

Instruction No. 12

You may find the evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. Thus, even if you should find that the defendant desired to conceal his receipt of moneys from anyone, you may also find in addition to such motive the existence of an intent to defraud the United States of

moneys due as income taxes and to attempt to defeat or evade such taxes.

United States v. Wexler,
79 F. 2d 526 (CCA-2).

Instruction No. 15

The indictment in this case charges a violation of Section 145 (b) of Title 26, United States Code, which so far as it applies here reads:

“* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty”

of an offense.

Instruction No. 17

The jury is composed of twelve people. While undoubtedly their verdict should represent the opinions of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. Each juror should listen, with a disposition to be convinced, to the opinions and arguments of the others. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

From the charge of Mr. Justice Willis Van Devanter in

United States v. William J. Graham,
(CCA-2), 102 F. 2d 436, certiorari denied,
307 U.S. 643.

Instruction No. 17-A

The jury are the exclusive judges of the weight of each of the several items of evidence and are also the exclusive judges of the credibility of each of the witnesses. In passing upon the credibility of a witness and the weight to be given to his testimony, the jury may consider his appearance upon the witness stand, whether he testified with candor or otherwise, and his interest in the case.

From the charge of Mr. Justice Willis Van Devanter in

United States v. William J. Graham,
(CCA-2), 102 F. 2d 436, certiorari denied,
307 U.S. 643.

Instruction No. 18

While the accused at the beginning of the trial is presumed to be innocent, yet if the proof establishes his guilt beyond a reasonable doubt, then the presumption of innocence disappears.

Shepard v. United States,
236 Fed. 73.

Instruction No. 19

The Government is not required to prove guilt to a mathematical certainty, nor is the Government

required to establish the exact amount of unreported income.

Schuerman v. United States,
174 Fed. (2d) 399.

Instruction No. 20

The defendant is charged with wilfully attempting to evade income taxes for the years 1945 and 1946 by filing a false return. Certain evidence has been admitted relating to events which occurred in other years. This evidence has been admitted under the rule that acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near and so related in kind as to throw light on the question of intent and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose. Evidence of such facts and circumstances, both prior and subsequent, are admissible if not too remote in time.

Schmeller v. United States,
143 F. (2d) 544, 551.

Instruction No. 21

“If it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and if the amount exceeds exemptions and deductions, that the income is taxable. United States v. Miro, (CCA) 60 F. (2d) 58;

Oliver v. United States, (CCA) 54 F. (2d) 48, certiorari denied, 285 U.S. 543, 52 S. Ct. 393, 76 L. Ed. 935; Guzik v. United States, (CCA) 54 F. (2) 618, certiorari denied, 285 U.S. 545, 52 S. Ct. 395, 76 L. Ed. 937; Capone v. United States, (CCA 7) 51 F. (2d) 609, 619, 76 A.L.R. 1534; Orzechowski v. United States, (CCA 3) 37 F. (2d) 713. See, also, Chadick v. United States, (CCA 5) 77 F. (2d) 961; Paschen v. United States, (CCA) 70 F. (2d) 491.”

Instruction No. 22

Tinkoff v. United States,
86 F. (2d) 868.

“It is not necessary that the Government prove an evasion of all the tax charged. It is sufficient if any substantial portion of a tax was defeated and evaded. O’Brien v. United States, 51 F. (2d) 193, CCA-7, certiorari denied, 284 U.S. 673, 52 S. Ct. 129, 76 L. Ed. 569; Gleckman v. United States, 80 F. (2d) 394 (CCA-8), certiorari denied, Feb. 10, 1936, 297 U.S. 709, 56 S. Ct. 501, 80 L. Ed. 996; United States v. Miro, 60 F. (2d) 58 (CCA-2).”

Instruction No. 23

The law does not give a defendant any presumption of good character.

Michelson v. U. S.,
335 U.S. 469, 475 (1948).

Instruction No. 24

The question of possible punishment of the defendant in the event of conviction is no concern of

the jury, and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence and determine the guilt or innocence of the defendant solely upon the basis of such evidence. Under your oaths as jurors, you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if he is convicted, to influence your verdict in any way.

Instruction No. 25

The Government is required to prove its case beyond a reasonable doubt. But the requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; it operates on the whole case, and not on separate bits of evidence each of which need not be so proven; and it cannot be accorded a quantitative value other than as a general cautionary admonition.

Gariepy vs. United States,

189 F. (2d) 459, 462, (CCA-6);

United States vs. Valenti,

134 F. (2d) 362, 364, (CCA-2);

United States vs. Spagnuolo,

168 F. (2d) 768, 770, (CCA-2);

United States vs. Yeoman Henderson, Inc.,

193 F. (2d) 867; (CCA-7);

McCoy vs. United States,

169 F. (2d) 776, (CCA-9).

Instruction No. 26 (Revised)

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return.

There has been some testimony in this trial tending to excuse the defendant's failure to record on his books wholesale sales of sailor suits on the ground that the entering of such transactions therein would have "distorted" the ratio between the cost price and purchase price of the goods he sold. I charge you as a matter of law that the defendant was required to keep a record of all his purchase and sales transactions. However, he could, of course, have segregated his records of wholesale and retail sales if he had cared to do so.

Section 54 of the Internal Revenue Code, as supplemented by Regulations 111, Section 29.54-1.

Instruction No. 27

The word "wilful" when used in a criminal statute generally means an act done with a bad purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether one has the right so to act.

United States vs. Murdock,
290 U. S. 389, 394-5.

Instruction No. 28

The law provides that if the method of accounting employed by a taxpayer does not clearly reflect his income, income shall be computed in accordance with such method as in the opinion of the Commissioner of Internal Revenue clearly reflects the taxpayer's income. Where a taxpayer's records are inadequate or inaccurate in substantial respects, the Courts have recognized (in both civil and criminal cases) that it is proper to determine taxable income by the net worth and expenditures method.

Of course, the Government does not have to prove the exact amounts of unreported income. To require a meticulous degree of proof in a case of the present sort would be tantamount to holding that skillful concealment is an invincible barrier to proof.

Section 41, Internal Revenue Code;

Barcott vs. United States,

169 F. (2d) 929, (9th Circuit);

United States vs. Johnson,

319 U. S. 503, 517-8.

Supplemental Instruction No. 32

The defendant has testified that he did not include the Goodman suits on the inventories as reported in his 1944 and 1945 Federal Income Tax returns. I will charge you at this time that his failure so to do is improper and unlawful. The individual taxpayer making a return of his income tax to the United States under the Federal law certifies under the penalties of perjury that the figures in-

cluded therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventories as reported on his returns.

However, the defendant in this case is not charged with that offense, and you cannot find him guilty of the offense charged in this indictment because you conclude that he was guilty of another offense.

If you believe, however, that the defendant had no Goodman suits as of December 31, 1944, then you need pay no consideration to the instruction where I have given you, because we are then not concerned with whether or not the offense was committed.

But, if you should believe that the defendant did have Goodman suits on hand as of December 31, 1944, then you may consider the unlawful failure to include them in the defendant's 1944 and 1945 income tax returns in determining the matter of the intent of the defendant with respect to the offenses charged in the indictment in this case.

Based on an instruction given by the Honorable Louis E. Goodman in

United States vs. Port, No. 33162.

Supplemental Instruction No. 16B

The defendant has testified that he did not include the Goodman suits in the inventory of December 31, 1944, as reported on his 1944 Federal Income Tax Return. I will charge you at this time that if you find that his failure so to do was intentional or wilful, then it was improper and unlawful. Under

the Federal law, the individual taxpayer making a return of his income tax to the United States certifies under the penalties of perjury that he believes that the figures included therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventory reported on his return if he did so knowingly.

However, the defendant in this case is not charged with filing a false inventory as of December 31, 1944; and you cannot find him guilty of any of the offenses charged in this indictment because you find he was guilty of another offense not charged in the indictment herein.

If you find that the defendant had no Goodman suits on hand as of December 31, 1944, then you need not consider this instruction. But, if you should believe that the defendant did have Goodman suits on hand as of December 31, 1944, then you may consider defendant's failure to include them in his December 31, 1944, inventory in determining the question as to whether the defendant intended to evade and defeat income taxes as charged in the indictment herein.

Based on an instruction given by the Honorable Louis E. Goodman in

United States vs. Port, No. 33162.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

DEFENDANT'S INSTRUCTIONS GIVEN

Dated: October 10, 1952.

/s/ GEORGE B. HARRIS,

United States District Judge.

Defendant's Requested Instruction No. 2

Section 145(b) of the Internal Revenue Code makes any person guilty of crime "who wilfully attempts in any manner to evade or defeat" any income tax or the payment thereof.

To prove its case, the Government must establish first that this defendant received taxable income which he failed to report on his return and that therefore his tax liability was greater than that shown on the return; and secondly, that the failure to report the alleged additional income was pursuant to a wilful attempt to evade or defeat his income taxes and those of his wife. It is necessary that the Government establish both elements of its case beyond a reasonable doubt.

Authorities:

Rose vs. United States,

(CCA-10; 1942) 120 F. (2d) 622, 626;

United States vs. Schenck,

(CCA-2; 1942) 126 F. (2d) 702, 704-705;

Gleckman vs. United States,

(CCA-8; 1935) 80 F. (2d) 394, 399.

Therefore if you have a reasonable doubt that the defendant omitted any income from his return, the

defendant is not guilty of the offense charged. And even if you find that the defendant omitted a portion of his income from his return and that of his wife, the defendant is not guilty unless you are convinced beyond a reasonable doubt that in failing to report such income, the defendant wilfully attempted to defeat or evade his income taxes and those of his wife.

The mere failure of a taxpayer to report a portion of his taxable income is not a crime within the meaning of Section 145(b) unless it has been proved beyond a reasonable doubt that he wilfully attempted to defeat or evade his income taxes or those of his wife.

Authority:

United States vs. Koppelman,
(D. C. M. C. Pa.; 1945) 61 F. Supp. 1007,
1008.

Defendant's Requested Instruction No. 3

The Government has presented figures allegedly representing the defendant's unreported income for the years in question based upon its computation of the defendant's net worth at the end of the years 1944, 1945 and 1946 respectively. You are instructed to disregard these figures and computations unless you have found, or are convinced beyond a reasonable doubt, that the defendant engaged in profitable transactions or activities (as distinct from mere "wash" or "no profit" transactions or activities) which he failed to record on his books. If you find that the only transactions omitted from the books

are such as resulted in no profit, there has been no proof of unreported income and you should acquit this defendant.

Authorities: In all decided cases where conviction was sustained on the net worth and expenditures method, the Government proved by independent affirmative evidence the receipt of unreported income (and not mere proceeds from wash transactions) from a specific transaction or a specific source of income not covered in the return.

United States vs. Chapman,

(CCA-7; 1948) 168 F. (2d) 997, 1001, 36 AFTR 1176

(Defendant was proved to have received black market overpayments in addition to regulation prices billed for meat on invoices.)

Scheuerman vs. United States,

(CCA, 1948) 174 F. (2d) 397.

(Defendant derived income from an illegal "numbers" game and kept no books at all.)

United States vs. Skidmore,

(CCA-7, 1941) 123 F. (2d) 604, 315 U. S. 800;

(Defendant sold "protection" to illegal operators of "handbooks" and no part of the receipts was ever included in his returns.)

United States vs. Johnson,

(1943) 319 U. S. 503, 320 U. S. 808;

(Defendant operated gambling establishments and did not report their winnings.)

United States vs. Potson,
(CCA-7, 1948) 171 F. (2d) 495.

(Defendant realized substantial income from gambling activities which he failed to report; also defendant manipulated the registers at his restaurant business so as to remove and conceal a portion of the receipts.)

Gleckman vs. United States,
(CCA-8; 1935).

(Defendant was proved to have conducted an illegal liquor business in addition to the business shown on the return as to which no books were kept and unreported income was traceable to the illegal liquor business.)

Defendant's Requested Instruction No. 5

The net worth approach of proving unreported income is an attempt to prove unreported income by circumstantial evidence where the Government has no direct evidence of unreported income. Circumstantial evidence may be a basis for conviction only if the evidence excludes every reasonable possibility of innocence.

Proof of the circumstance that the defendant's acquisition of assets plus his non-deductible expenditures during a given year exceeded his reported income, is not inconsistent with the theory that such excess expenditures may have been made from sources other than current income, e.g., from cash and other assets accumulated prior to the starting point.

Therefore unless the evidence has negated beyond a reasonable doubt, the possibility that the excess expenditures may have been made from prior accumulations, the Government has failed to prove that such expenditures constituted unreported taxable income.

Authorities:

- Stubbs vs. United States,
 (CCA-4, 1924), 2 F. (2d) 468;
 Lamb vs. United States,
 (CCA-1, 1920) 264 F. 660, 664;
 Bryan vs. United States,
 (CCA-5, 1949) 175 F. (2d) 223, 225;
 Fenwick vs. United States,
 (CCA-5, 1949) 177 F. (2d) 788.

Defendant's Requested Instruction No. 6

Wilfulness is an essential element of the offense charged in each of the counts of the indictment. Wilfulness means a specific wrongful intent to evade the tax. Therefore, unless you find beyond a reasonable doubt, not only that a false return has been filed but that the defendant filed, or caused the return to be filed, with knowledge that it was false and with the corrupt and criminal intent to evade his obligation, you must acquit the defendant.

Authorities:

- Hargrove vs. United States,
 (CCA-5, 1933) 67 F. (2d) 820, 822, 823;
 Haigler vs. United States,
 (CCA-10, 1947), 172 F. (2d) 386.

Defendant's Requested Instruction No. 7

To find the defendant guilty of a wilful attempt to evade the tax, you must be convinced beyond a reasonable doubt: (1) That the defendant intended to evade or defeat the tax; and (2) that he did some affirmative act in furtherance of such intent.

Authorities:

- Guzik vs. United States,
(CCA-7,) 54 F. (2d) 618,
Cert. den. 285 U. S. 545;
- Spies vs. United States,
(1943) 317 U. S. 492.

It is not enough for the Government to prove that the defendant did some act which tended to understate his tax liability such as a failure to record a certain transaction or reporting a loss from a sale which, in fact, resulted in a taxable gain. In addition, the Government must prove beyond a reasonable doubt that the act was wilfully done, that is, with the criminal intent to defraud the Government of a tax which the defendant knew was due from him. ~~If you find that the defendant omitted certain transactions from the books because he honestly believed that such transactions resulted in no profit, or that the defendant honestly though erroneously treated the result of a sale as a loss instead of a gain, then such transactions are not a basis for convicting the defendant of the crime with which he is charged.~~

Authorities:

- Guzik vs. United States, *supra*;
- Murdock vs. United States,
290 U. S. 389, 395-396.

Defendant's Requested Instruction No. 7-A

The Government charges that the defendant in preparing the return for the partnership which sold the Riverdale Ranch reported the transaction as resulting in a loss for the partnership when under the applicable law the sale resulted in a capital gain. ~~Under the applicable law, the "cost basis" of the property (which measures the tax-free portion of the proceeds from the sale), was the appraised value of the property at the time of the death of the defendant's father, whereas the defendant claims to have used the original cost of the property as the "cost basis" in computing the reported loss of \$84.22.~~

If you find that the defendant reported a loss from the sale of the ranch because he did not know or misunderstood or misinterpreted the law applicable in such a case and not because he intended to evade his tax liability, the defendant is not guilty of any offense by reason of reporting a loss though, in fact, the transaction resulted in a capital gain.

In determining whether or not defendant was motivated by an intent to evade his tax liability, you may consider that the share of taxable income from the transaction attributable to defendant did not exceed \$497.64.

Authority:

Haigler vs. United States,
(CCA-10; 1949) 172 F. (2d) 986.

Defendant's Requested Instruction No. 9

The Government charges that the defendant omitted from the Milton H. Olender Net Worth Statement

(United States Exhibit 1), prepared for the Revenue Agents by Mr. Ringo, his attorney and accountant, certain stock of the Asturias Export-Import Corporation, as well as his wife's savings account. According to the files taken from the Bureau of Internal Revenue at San Francisco (Defendant's Exhibit 1), the Bureau determined that as of December 31, 1947 (the date as of which the Net Worth Statement was prepared), the stock was totally worthless.

If you find that the defendant honestly believed that neither the worthless stock nor his wife's savings account belonged on his Net Worth Statement, the defendant is not guilty of any wilful concealment and you may not infer from these omissions that the defendant harbored an intent to evade his taxes.

The Government has also adduced evidence that the taxpayer consummated several transactions involving the use of large amounts of cash. You are instructed that there is nothing unlawful about the use of large amounts of currency. If you find that the defendant did not attempt to use these transactions in any manner to conceal assets, then you may not infer any intent on the part of the defendant to evade his taxes.

Authority:

Seaman vs. United States,

(CCA-5, 1938) 96 F. (2d) 732;

Murdock vs. United States, 290 U. S. 389,
395, 396.

Plaintiff's Requested Supplemental Instruction

The defendant has testified that he did not include the Goodman suits in the inventory of December 31, 1944, as reported on his 1944 Federal Income Tax Return. I will charge you at this time that if you find that his failure so to do was intentional or wilful, then it was improper and unlawful. Under the Federal law, the individual taxpayer making a return of his income tax to the United States certifies under the penalties of perjury that he believes that the figures included therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventory reported on his return if he did so with criminal intent to evade his tax liability.

However, the defendant in this case is not charged specifically with filing a false inventory as of December 31, 1944; and you cannot find him guilty of any of the offenses charged in this indictment because you find he was guilty of another offense not charged in the indictment herein.

If you find that the defendant had no Goodman suits on hand as of December 31, 1944, then you need not consider this instruction. But if you should believe that the defendant did have Goodman suits on hand as of December 31, 1944, then you may consider defendant's failure to include them in his December 31, 1944, inventory in determining the question as to whether the defendant intended to evade and defeat income taxes as charged in the indictment herein.

Based on an instruction given by the Honorable Louis E. Goodman in United States vs. Port, No. 33162.

Defendant's Requested Supplemental Instruction

Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

Authority:

Section 2061 Code of Civil Procedure.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

DEFENDANT'S INSTRUCTIONS REFUSED
AS COVERED BY THE COURT OR OTHERWISE
INAPPLICABLE

Dated: October 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Defendant's Requested Instruction No. 1

It is requested that the Court give its usual instructions upon the following subjects:

1. Province of Court and jury.
2. Effect of indictment.
3. Presumption of innocence and burden of proof.
4. Duration of presumption of innocence.
5. Definition of reasonable doubt.
6. Credibility of witnesses.
7. Oral admissions.
8. Effect of evidence of good character.
9. Circumstantial evidence.

Defendant's Requested Instruction No. 4

In this case, the Government has not offered any direct testimony of unreported income or of any undisclosed source of income. The defendant caused to be kept what appears to be a complete set of books in regard to the transactions of his business known as the Army and Navy Store and the Government has not offered any evidence showing any specific inaccuracies or omissions in the books of the defendant resulting in understatements of income.

In order to prove that the defendant received taxable income over and above that reported in the returns of the defendant and his wife for the years involved, the Government has attempted to reconstruct the defendant's taxable income for each of the two years by the net worth method, so-called. The Government has attempted to show the defendant's "net worth" (i.e., excess of assets over liabilities) at the starting point of the period (which, in this case, is December 31, 1944, or January 1, 1945).

It then attempted to show an alleged net worth increase for the first of the two years by comparing the starting net worth with the net worth at the end of the first taxable year involved; the Government then attempted to show an alleged net worth increase for the second year by comparing the net worth at the end of the first taxable year with the defendant's net worth at the end of the second taxable year involved. The Government contends that the alleged increase of the defendant's net worth during each of the two taxable years, plus a specified amount of non-deductible expenditures (representing taxes paid and living expenses) incurred during such year, constitutes the defendant's total taxable income. This indirect method of reconstructing a taxpayer's income is invalid unless the Government has clearly and accurately established all of the assets and liabilities of the taxpayer at the starting point of the period. In this connection you must bear in mind that the list of assets and liabilities set forth in the stipulation admittedly does not include all of the assets and liabilities of the defendant at the beginning of the period.

If you then have a reasonable doubt that the assets which the Government contends the defendant owned at the starting point of the period (December 31, 1944) included all of the assets owned by the defendant at that time, the alleged net worth increase and unreported income have not been proved and the Government's case has failed. In that case you must acquit the defendant.

Authorities:

United States v. Chapman

(CCA-7, 1948) 168 F. (2d) 997;

Bryan v. United States

(CCA-5, 1949) 175 F. (2d) 223, 224;

United States v. Fenwick

(CCA-7, 1949) 177 F. (2d) 488.

Defendant's Requested Instruction No. 4-A

If you believe that the so-called Goodman transaction took place as set forth on defendant's Exhibit No. AL (Schedule 1), and if you further believe that the United States Treasury Bonds shown as Mother's Bonds on defendant's Exhibit AK (Schedule 3) were held in the box of the defendant and his mother for his mother and were, in fact, owned by the defendant's mother, then the Government's net worth computation and the Government's computation of net income allegedly received by the defendant as set forth on U. S. Exhibit 51 are contrary to fact and invalid. In that event, you should acquit the defendant.

Authorities:

Rose v. United States

(CCA-10; 1942) 120 F. (2d) 622, 626; 29

AFTR 686, 690;

United States v. Schenck

(CCA-2; 1942) 126 F. (2d) 702, 704, 705,

28 AFTR 1502, 1504-1505;

Gleckman v. United States

(CCA-8, 1935) 80 F. (2d) 394, 399, 16

AFTR 1425, 1430.

Defendant's Requested Instruction No. 4-B

If you have a reasonable doubt that the Government's computation of the defendant's base period net worth (that is, the net worth as at December 31, 1944, set forth on United States Exhibit No. 51), is correct or that the list of assets shown on United States Exhibit No. 51 is complete, then this defendant is entitled to an acquittal.

Authorities:

Rose v. United States

(CCA-10; 1942) 120 F. (2d) 622, 626, 29
AFTR 686, 690;

United States v. Schenck

(CCA-2; 1942) 126 F. (2d) 702, 704-705,
28 AFTR 1502, 1504-1505;

Gleckman v. United States

(CCA-8; 1935) 80 F. (2d) 394, 399, 16
AFTR 1425, 1430.

Defendant's Requested Instruction No. 5-A

(Alternative to Instruction No. 5)

The net worth approach of proving unreported income is an attempt to prove unreported income by circumstantial evidence where the Government has no direct evidence of unreported income. The Government has attempted to establish the defendant's taxable income by circumstantial evidence. Circumstantial evidence must not only be consistent with the theory of guilt but also must be utterly inconsistent with any other rational theory.

Proof of the circumstance that the defendant's acquisition of assets plus his non-deductible ex-

penditures during a given year exceeded his reported income, is not inconsistent with the theory that such excess expenditures may have been made from sources other than current income, e.g., from cash and other assets accumulated prior to the starting point.

Therefore, unless the evidence has negatived beyond a reasonable doubt, the possibility that the excess expenditures may have been made from prior accumulations, the Government has failed to prove that such expenditures constituted unreported taxable income.

Authorities:

Stubbs v. United States

(CCA-4, 1924), 2 F. (2d) 468;

Lamb v. United States

(CCA-1, 1920) 264 F. 660, 664;

Bryan v. United States

(CCA-5, 1949) 175 F. (2d) 223, 225;

Fenwick v. United States

(CCA-5, 1949) 177 F. (2d) 788.

Defendant's Requested Instruction No. 8

If you find that because of circumstances prevailing during the years in question, the defendant had no opportunity to know what his true income was, but did the best he could to keep reasonably accurate records, even though he did not comply with the best accounting practices, the defendant is not guilty of the offense with which he is charged.

In this connection you are also instructed that there is a distinction between what the law requires

and what public accountants consider good accounting practice. The income tax law does not require a taxpayer to keep records of wash transactions or transactions which result in no profit.

Authorities:

Hargrove v. United States

(CCA-5, 1933) 67 F. (2d) 820, 822-823;

Haigler v. United States

(CCA-10; 1947) 172 F. (2d) 386;

Internal Revenue Code, Sec. 41;

Huntington Securities Corp. v. Busey

(CCA-6; 1940) 112 F. (2d) 368, 370.

Defendant's Requested Instruction No. 8-A

In considering the question of wilfullness, you should take into account whether or not the defendant, in good faith, made available to his bookkeeper all of the invoices, papers, checks and other data she required for properly keeping the books. If the defendant on occasions failed to give the bookkeeper certain essential information or data, no inference of wilfullness may be drawn from such failure if it was not motivated by a desire to evade his tax liability but was due to such factors as oversight, overwork or a belief, in good faith, that the transaction was a non-profit sale resulting in no taxable income.

Authority:

Haigler v. United States

(CCA-10; 1947) 172 F. (2d) 986.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to Milton H. Olender, the defendant at the bar, as follows:

Guilty, as to Count 1;

Guilty, as to Count 2;

Guilty, as to Count 3;

Guilty, as to Count 4.

/s/ EDWARD C. CHEW,
Foreman.

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant, by his attorneys, John V. Lewis and Emmet F. Hagerty, moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict as to the third and fourth counts of the indictment relating to the year 1946 is contrary to law and to the weight of the evidence.

3. The verdict as to the first and second counts relating to the year 1945 is not supported by substantial evidence.

4. The Court erred in overruling defendant's

objections to the admission in evidence of United States Exhibits 26 and 45 and of the testimony of Charles R. Ringo, Attorney at Law.

5. The Court erred in overruling defendant's objections to the admission in evidence of United States Exhibit No. 55, which included the affidavit filed by the defendant's wife on May 6, 1939.

6. The Court erred in giving the instructions excepted to by defendant's counsel.

7. The Court erred in refusing to strike the testimony of the witness Root from line 17, p. 1257, to line 5, p. 1258, where the witness Root read from the purported Goodman invoices, which were not admissible in evidence.

8. Defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

The attorney for the Government stated in his argument to the jury that the defendant and the witnesses Leavy and Lerman, were engaged in black market transactions, whereas there was no evidence in the record to the effect that the defendant ever engaged in any black market transactions.

Dated: October 14, 1952.

SHERWOOD & LEWIS,
EMMET F. HAGERTY,

By /s/ JOHN V. LEWIS,
Attorneys for Defendant.

[Endorsed]: Filed October 13, 1952.

United States District Court for the Northern
District of California, Southern Division

No. 33181

UNITED STATES OF AMERICA,

vs.

MILTON H. OLENDER.

JUDGMENT AND COMMITMENT

On this 10th day of November, 1952, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of violations of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b). (On or about the following dates, in the Northern District of California, Milton H. Olender, late of Oakland, California, did wilfully and knowingly attempt to defeat and evade a large part of the income taxes due and owing by defendant Milton H. Olender and his wife, Bessie B. Olender, to the United States of America for the following calendar years, by filing with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, certain false and fraudulent income tax returns, viz:

Count 1—March 15, 1946, filed false Income Tax Return of Milton H. Olender for year 1945;

Count 2—March 15, 1946, filed false Income Tax Return of Bessie B. Olender for year 1945;

Count 3—March 15, 1947, filed false Income Tax Return of Milton H. Olender for year 1946;

Count 4—March 15, 1947, filed false Income Tax Return of Bessie B. Olender for year 1946,

as charged in said Counts 1, 2, 3, 4 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Three (3) years and fined Ten Thousand Dollars (\$10,000.00) on Count One.

Three (3) years and fined Ten Thousand Dollars (\$10,000.00) on Count Two.

Three (3) years and fined Ten Thousand Dollars (\$10,000.00) on Count Three.

Ordered that said sentence of imprisonment and fine as to Counts One, Two, and Three commence and run Concurrently.

Ordered that the defendant pay a fine of Ten Thousand Dollars (\$10,000.00) on Count Four.

Total Sentence—Three (3) years and Twenty Thousand Dollars (\$20,000.00) fine.

It Is Adjudged that the defendant pay costs of prosecution herein.

Ordered that defendant may have a stay of execution for fifteen (15) days as to payment of fines.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE B. HARRIS,
United States District Judge.

Examined by:

/s/ ROBERT J. DREWES,
Assistant U. S. Attorney.

The Court recommends commitment to an institution to be designated by the U. S. Attorney General.

C. W. CALBREATH,
Clerk.

By /s/ HOWARD F. MAGEE,
Deputy Clerk.

[Endorsed]: Filed and entered November 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Milton H. Olander, 121 Alpine Terrace, Oakland, California.

Name and Address of Appellant's Attorneys: Emmet F. Hagerty, Esq., 240 Stockton Street, San Francisco, Calif.

Messrs. Sherwood & Lewis, 703 Market Street, San Francisco, Calif.

Offense: Wilful attempt to defeat or evade income tax.

Found guilty on four counts of the indictment, charging in each instance, violations of Section 145(b) Internal Revenue Code, 26 U.S.C. Section 145(b).

Sentenced: November 10th, 1952.

Defendant is now on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Pursuant to Rule 38(a)(2), Federal Rules of Criminal Procedure, we hereby service notice that we do not elect to enter upon the service of the sentence pending appeal.

Dated: November 10th, 1952.

/s/ EMMET F. HAGERTY,

SHERWOOD & LEWIS,

By /s/ JOHN V. LEWIS,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed November 10, 1952.

[Title of District Court and Cause.]

PETITION FOR STAY OF PAYMENT OF
FINE PENDING DETERMINATION OF
APPEAL

Now Comes Milton Olender, the defendant in the above-entitled cause and the petitioner herein, in person and by John V. Lewis, Esq., and Emmet F. Hagerty, Esq., his attorneys, and respectfully represents:

1. That he was indicted for violation of Section 145(b) Internal Revenue Code, 26 U.S.C. section 145(b) on four counts, and was tried before the Honorable George B. Harris, District Judge, and a jury; that he was found guilty on all four counts, and that judgment upon the verdict was entered on November 10, 1952, whereby defendant and petitioner herein was sentenced to serve three years, and that he pay a fine of Twenty Thousand Dollars (\$20,000.00); and that the Court ordered a stay of execution of said judgment for a period of fifteen (15) days from November 10, 1952.

2. That on November 10, 1952, defendant and petitioner herein caused a notice of appeal to be duly filed as provided by law in preparation for an appeal from said judgment to be filed with the United States Court of Appeals for the Ninth Circuit.

3. That the Court ordered petitioner to remain free on bail pending the determination of his appeal and that said bail was set at Two Thousand Five Hundred Dollars (\$2,500.00).

4. That the petitioner herein is carrying on a

retail business known as the Army and Navy Store, at 1026 Broadway, Oakland, California; that the said business is the principal source of livelihood for defendant and his family. That the payment of the fine of Twenty Thousand Dollars (\$20,000.00) at this time would result in depriving petitioner's business of the necessary cash resources and would make it impossible for petitioner to continue the operation of said business while said appeal is pending.

5. That the Government of the United States now has liens on property of said petitioner of the value in excess of Three Hundred Thousand Dollars (\$300,000.00).

Wherefore, your petitioner respectfully represents that the ends of justice and the best interests of the public as well as those of your petitioner, will be subserved by ordering a stay of the payment of said fine pending the determination of petitioner's appeal; and

Your petitioner does respectfully pray the Court for a stay of the payment of such fine upon such terms and conditions as the Court may deem best.

/s/ MILTON H. OLENDER,
Petitioner.

SHERWOOD & LEWIS,
EMMET F. HAGERTY,

By /s/ JOHN V. LEWIS,
Attorneys for Petitioner.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1952.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF PAYMENT OF
FINE PENDING DETERMINATION OF
APPEAL

Upon Reading and filing the petition of Milton H. Olender, the defendant in the above-entitled matter; and

Good Cause Appearing Therefore,

It Is Hereby Ordered that the said defendant be, and he is hereby granted, a stay of execution until the 21st day of December, 1952; and

It Is Hereby Further Ordered that said defendant be, and he is hereby granted a stay of the payment of the fine of Twenty Thousand Dollars (\$20,000.00) imposed pursuant to judgment entered on November 10, 1952, provided that said defendant shall post a bond in the amount of \$20,000.00.

Dated this 21st day of November, 1952.

/s/ GEORGE B. HARRIS,

Judge of the United States
District Court.

[Endorsed]: Filed November 24, 1952.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 33181

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON H. OLENDER,
Defendant.

Before: Hon. George B. Harris,
Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

ROBERT J. DREWES, ESQ.,

JAMES H. SHELTON, ESQ.

For the Defendant:

JOHN V. LEWIS, ESQ.,

EMMET HAGERTY, ESQ.

September 15, 1952, 3:00 P.M.

The Court: Stipulated that the jurors are present, Gentlemen?

(So stipulated.)

The Court: That stipulation may endure throughout the progress of the trial unless otherwise indicated?

(So stipulated.)

The Court: You may proceed.

Mr. Hagerty: If your Honor please, may we have on behalf of the defendant an order excluding all witnesses until called to testify?

Mr. Drewes: No objection, your Honor. May that exclude the revenue agents and special investigators?

The Court: So ordered.

Mr. Drewes: May it please the Court and ladies and gentlemen of the jury. At this time, as the prosecuting attorney in the case, it is my duty to explain to you the Government's case in the matter. The purpose of doing that, of course, is to enable you to more fully appreciate the sometimes unrelated bits of evidence as the Government puts that evidence and that testimony into the record. That is particularly necessary in a case of this type for reasons that I will explain to you in just a moment.

As the Judge has already told you, the defendant in [2*] this case has been charged with the willful attempt to evade income taxes on the part of himself and on the part of his wife for the years 1945 and 1946. There are four counts in the indictment, two for each year.

The reason for that is that the taxpayer reported his income and that of his wife on a community basis so that the taxpayer and his wife each submitted a return for the two years in question. Now, in this particular case, the taxpayer, Mr. Olender, has been charged with an attempt to evade

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

his own taxes in connection with the returns which he submitted on his behalf, and also with the willful attempt to evade that portion of the community income which his wife returned on her income tax returns for the two years.

Of course, Mr. Olender has been charged in connection with the returns submitted by his wife rather than Mrs. Olender herself because we expect to prove that he prepared the returns, and of course submitted them in her name as is the common practice in this and other states which follow the community property system.

As I believe the Court will instruct you at the proper time, each one of the four counts stands alone and may be considered by you alone, and of course that is also true, I am sure the Court will tell you, with respect to the two years involved. Mr. Olender has been charged with [3] filing false returns, as I have explained to you, both for the year 1945 and for the year 1946, and so the Government's proof will be considered by you with respect to each of those two years.

Now, in a prosecution of this kind the Government must prove first that the taxpayer enjoyed unreported income. That is, that he had income in excess of the amounts which he returned for the years in question, in this particular case, of course, for the years 1945 and 1946. Then secondly, the Government must prove that the taxpayer intended to evade taxes to the United States when he failed to return this unreported amount of income.

In this particular case the Government will at-

tempt to prove—and I submit will prove to your satisfaction—that Mr. Olender failed to report substantial income in 1945 and 1946, and we are going to prove that by resorting to what is referred to in cases of this kind as the net worth basis, or the net worth approach to the establishment of unreported income, and that is why I mentioned to you a moment ago that the opening statement on behalf of the prosecutor is particularly important in cases of this particular kind, because I want to explain to you, and I think I can in very simple language, what we mean by the net worth approach.

Possibly some of you already have had some experience [4] in such matters or can anticipate the approach which I am going to explain to you now. It is this. The Government starts out by proving in a selected base year the value of the assets and the extent of the liabilities owned and outstanding against the taxpayer as of the last day of that year or the first day, as the case may be. Then, the Government establishes the extent of the assets and the extent of the liabilities of the taxpayer as of the last day of the next succeeding year. If there is a material difference between the two the conclusion is inescapable that the taxpayer has either increased his holdings or decreased his holdings during the period in question.

So hypothetically, suppose that on the 31st day of December of 1930 a man has total net assets, that is the gross assets subtracting his obligations from them of \$50,000. Suppose on the same day, December 31st of 1931 his assets minus his liabili-

ties or his net assets is \$100,000. It follows then, of course, that he has increased his holdings by the amount of \$50,000 during the course of that year measured between the dates December 31, 1930, and the same day of 1931.

Now, that isn't the entire story, of course, because the Government then, in measuring the income of the taxpayer for that particular year may of course, add to that \$50,000 by which figure it has shown his holdings increased [5] during the period, the Government may add to that figure such items as federal taxes paid.

So if we have shown by a net worth basis that he increased his holdings by \$50,000 he must have had income in that amount in order to acquire those assets. If we also show that during that year he paid \$5,000 in federal income taxes we can add that to the \$50,000 and say, well, it is obvious that he had \$55,000 in income for that year.

There is yet another class of expenditures which we may take into consideration and those are such non-deductible items as living expenses. You know, of course, that taxpayers—which is almost a universal class these days, may not deduct from their reported incomes such items, as food, rent, domestic help, telephone, utilities, and matters of that kind. Of course, I am not talking now of a business taxpayer or corporate taxpayer, but the individual taxpayer. He may not take deductions for items of that kind. So if we can then establish during this hypothetical year in question that in addition to the increase in his assets, in his net assets, he

also paid \$5,000 income taxes and then that he also expended, let's say \$5,000 in living expenses, non-deductible expenses, we may then safely add that to the figure and say, now we have established that during this particular year this particular taxpayer must [6] have had income of \$60,000. Now, that is the net worth, so-called net worth approach to the proof of taxpayer income during a specific period.

In this particular case the Government will attempt to establish its base year as 1944, which is the year immediately preceding the two years for which it is charged that the defendant attempted to evade his taxes. In some cases the base year is often much more remote in time. Sometimes the Government, in cases of this kind, goes back a number of years for the purpose of establishing its starting point. But our starting point here is the year 1945 and we will prove that during the years 1945 and 1946 this taxpayer enjoyed income substantially in excess of the sums which he and his wife reported for those two years.

There is another matter that I wish to take up just preliminarily with you. The prosecution and counsel for the defendant have succeeded in working out a stipulation, which is something in agreement covering many of the assets owned by the defendant during this period of time. That will materially shorten the trial and is advantageous in that respect to all concerned. At the proper time I will introduce it into evidence and at that time I will either read it in its entirety or sum-

marize it for you. The stipulation does not purport to cover all of the assets owned by the defendant, nor does it cover all of the so-called [7] non-deductible living expenses that I mentioned.

Of course, there is a very simple reason for that. It is because some items are in dispute. The stipulation covers many items such as the amount of money in banks and Treasury bonds that are held by the taxpayer, and the value of his business in part and things of that kind which are a matter of record and of which there is no dispute. So we have set those matters forth in detail in the stipulation which will be introduced into the record in this case and which you will be instructed, in due course, constitutes evidence in the case and is to be accepted by you as such.

But to repeat, that stipulation does not include all of the assets. The Government will introduce evidence of additional assets owned by the taxpayer during the course of the trial.

With respect to the intent of the defendant, the Government will prove that the defendant, whom I should state to you at this time is a businessman, a merchant, and the owner and operator of what is known as the Army-Navy Store located on Broadway in the City of Oakland. He acquired that store in 1928 and has operated it continuously at the same location, I believe, since that date.

Now, the Government will establish that the defendant is a man who, as I have already indicated, not only has had [8] extensive business experience, but is also a college graduate, attended the Uni-

versity of California where, among other courses, he also studied accounting.

In the operation of his business we will show that he was intimately aware of the status of his business, that he was familiar with accounting procedures, and that as far as the accounting and fiscal operations of his business was concerned he himself undertook to control them, and knew at all times precisely what the status of his business was.

We will show that the understatements of income for the two years in question were so large that the defendant must have known that they existed; that they were of such magnitude that any such inferences as might, in some other cases be drawn as to inadvertence or mere negligence is out of the question.

At the appropriate stage of the trial the Government will summarize for you the evidence of net worth which we believe will have been established. The evidence which you will hear, as I indicated to you a little while ago, is apt in a case of this kind to be just a little bit disjointed. It is rather hard to keep in one's mind a series of figures, to say nothing of an attempt to keep in one's mind a running calculation of just what all of the figures that one has heard mean at any given time. So, at the conclusion of the Government's case the [9] Government will summarize for you its version of what the evidence establishes with respect to the net worth and tax liability of the defendant for

the years in question. I can say that with absolute confidence, that if there is anything in that summary or recapitulation that the defense quarrels with that will be brought to your attention by the defendant's counsel forthwith and in as forceful a manner as possible.

That, ladies and gentlemen, is a brief summary of the type of case known as the net worth type case of which this is one, and a brief summary of what the Government intends to prove.

At the conclusion of Government's case I believe you will be satisfied that the defendant, Milton Olender, enjoyed large amounts of income for the two years in question which he did not report on his return, and you will conclude further that he knew that and intended to so do.

The Court: Call your first witness for the Government. Do you wish to reserve your statement, Counsel?

Mr. Lewis: Yes, sir.

The Court: I assumed you did.

LOUIS H. MOOSER, JR.

called as a witness for the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury. [10]

The Witness: Louis H. Mooser, Jr., 6815 California Street, San Francisco, California, Deputy Collector of Internal Revenue.

(Testimony of Louis H. Mooser, Jr.)

Direct Examination

By Mr. Drewes:

Q. Mr. Mooser, you are a deputy collector of internal revenue? A. Yes, sir.

Q. Assigned to what office?

A. The San Francisco office of the collector.

Q. What is the address?

A. 100 McAllister Street.

Q. As such do you have access to the official files and records of that collector's office?

A. Yes, I do.

Q. Mr. Mooser, have you brought with you this afternoon the tax returns of Milton Olender and Mrs. Olender for the years 1945 and 1946?

A. Yes, sir, I have.

Q. And did you get those from the files and records of the collector's office in San Francisco?

A. Yes, I did.

Q. May I see them?

(Thereupon the witness handed documents above referred to to Mr. Drewes.)

Mr. Drewes: At this time the Government will offer these [11] returns in evidence, your Honor. I understand Mr. Lewis has no objection.

The Court: They may be marked in evidence.

Mr. Drewes: May we have them marked separately, starting with 1945, Mr. Olender's return?

The Clerk: United States Exhibits 1, 2, 3 and 4 in evidence.

(Testimony of Louis H. Mooser, Jr.)

(Thereupon the documents above referred to were received in evidence and marked Government's Exhibits 1, 2, 3 and 4 respectively.)

Q. (By Mr. Drewes): Mr. Mooser, have you with you Mr. Olender's return for the year 1942?

A. Yes, sir, I have.

Q. Do you have with you a return for the Army-Navy Store, Broadway, Oakland, for the year 1942?

A. No, sir, I do not.

Q. Do you have with you a return of Milton Olender for the year 1943?

A. Yes, sir.

Q. Do you have with you the return of Mrs. Olender for that year?

A. Yes, sir.

Q. Do you have with you the return of Mr. Olender for the year 1944?

A. Yes, sir. [12]

Q. Do you have with you the return of Mrs. Olender for the year 1944?

A. Yes, sir.

Q. May I see those, please?

(Witness hands documents above referred to to Mr. Drewes.)

Mr. Drewes: At this time the Government will offer these returns as Government's Exhibits next in order. I understand there is no objection.

The Court: They may be marked appropriately.

The Clerk: United States Exhibits 5, 6, 7, 8, 9 and 10 in evidence.

(Thereupon the documents above referred to were received in evidence and marked United States Exhibits 5, 6, 7, 8, 9 and 10 respectively.)

(Testimony of Louis H. Mooser, Jr.)

Q. (By Mr. Drewes): Mr. Mooser, do you have with you the return of Milton Olender for the year 1947? A. Yes, sir.

Q. Do you have with you the return of Milton Olender for the year 1948? A. Yes, sir.

Q. May I have those, please?

(Thereupon the witness handed the documents above referred to to Mr. Drewes.)

Mr. Drewes: May I ask, your Honor, that these two returns be marked for identification. [13]

The Court: They may be marked for identification.

The Clerk: United States Exhibits 11 and 12 for identification only.

(Thereupon the documents above referred to were received and marked United States Exhibits 11 and 12 for identification respectively.)

Q. (By Mr. Drewes): The returns which you have just handed me, Government's Exhibits 11 and 12 for identification, were brought with you from the files of the collector's office in San Francisco? A. Yes, sir, they were.

Q. Do you have with you, Mr. Mooser, the returns for a partnership of Olender, Hamilton, Kaplan and Gambor, Fresno, California, for the years 1945 and 1946?

A. For the year 1945, yes, under that name, and the one under 1946 is under a different name.

Q. May I see that?

(Testimony of Louis H. Mooser, Jr.)

(Thereupon the documents above referred to were handed to Mr. Drewes.)

Mr. Drewes: Your Honor, may the return of the partnership, Olender, Hamilton, Kaplan and Gambor for the year 1945 be marked for identification?

The Court: It may be marked.

(Thereupon the document above referred to was marked United States Exhibit number 13 for identification.) [14]

Q. (By Mr. Drewes): And the partnership return for the year 1945 you brought with you from the files of the office of collector of internal revenue in San Francisco? A. Yes, sir.

Q. Mr. Mooser, will you see if you can locate the return of the partnership for the year 1946 and bring it to this courtroom tomorrow morning?

A. Yes, I will.

Q. Will you also bring with you tomorrow morning a partnership return of the Army-Navy Store for the year 1942 if you find that there is one in the files at the office of the collector?

Mr. Lewis: There is no partnership for the year 1942.

Mr. Drewes: I beg your pardon, the Army-Navy return is not a partnership return. I have no further questions.

Mr. Lewis: No questions.

(Witness excused.)

GEORGE HORNE

called as a witness for the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury?

The Witness: George Horne, 110 Arbor Drive, Piedmont, accountant.

Direct Examination

By Mr. Drewes:

Q. Mr. Horne, you are a certified public [15] accountant? A. I am.

Q. In the year 1946, Mr. Horne, were you employed by a corporation known as the Asturias Import and Export Corporation?

A. That is correct.

Q. In connection with your employment by that corporation did you maintain the books?

A. I did.

Q. And in response to a subpoena duces tecum have you brought those books with you?

A. Yes.

Q. May I see them, please?

(Witness hands books referred to to Mr. Horne.)

Q. (By Mr. Drewes): Mr. Horne, do the books of the corporation reflect a cash receipt from one Milton Olender in 1946? A. Yes.

Q. Would you please identify that particular

(Testimony of George Horne.)

entry in the books for the benefit of the jury and counsel?

A. How do you wish me to identify it?

Q. Where does it appear and what is the nature of the entry, Mr. Horne?

A. In July, 1946, there was an entry for \$5,000 for a stock purchase.

Q. Stock purchased by whom?

A. By Milton Olender. [16]

Q. Where does that appear in the record?

A. General Journal number 1.

Q. Do the books reflect, Mr. Horne, a subsequent receipt of the same amount from Milton Olender?

A. Yes, they do.

Q. Would you please turn to that particular entry?

A. On December 13, 1946, there was a receipt for \$5,000.

Q. And to what account was that credited?

A. That was credited at that time to a notes payable account.

Q. December 13, you say, 1946?

A. Yes, sir.

Q. Where does that entry appear in the record which you have in front of you?

A. On the cash receipt journal number 3.

Q. Do the books reflect any subsequent disposition of the last item to which you have referred?

A. Later on that amount was transferred to capital stock amount for the capital stock concern.

Q. In the name of Milton Olender?

(Testimony of George Horne.)

A. In the name of Milton Olender.

Q. What was that particular date for that entry?

A. The book entry date was in January, 1948.

Q. Is that the date upon which the stock was issued to Mr. Olender, that you know? [17]

A. I do not believe it was. I believe the stock was issued prior to that time.

Q. Do you know the date?

A. No, I do not.

Q. State if you can, Mr. Horne, if the shares purchased by Mr. Olender July 1, 1946, remained outstanding as of the end of that year, December 31, 1946? A. Yes, they were. [18]

Q. (By Mr. Drewes): And with respect to the entry to which you have testified, cash receipts from Milton Olender on December 13, 1946, is that credit still outstanding as of the 31st day of January, 1946? A. Yes, it was.

Q. I understand I said January. May the record show the question was December 31, 1946. And would your answer be the same?

A. December 31st, 1946.

Q. Referring again to the entry, July 1, 1946, does the record that you have before you show how many shares were purchased by Mr. Olender at that time? A. It was 500.

Q. Do the books which you have in front of you indicate how many shares were received by Mr. Olender in connection with the second transaction in December of 1946?

A. No, sir, the books do not show the number of

(Testimony of George Horne.)

shares issued. Just the transfer from the notes payable, account to the stock account.

Q. You have testified with respect to the entry on December 13, 1946, that the corresponding credit was made to the account notes payable?

A. Yes, sir.

Q. Do you know of your own knowledge whether or not that transaction was intended for a capital contribution by Mr. [19] Olender?

A. I believe that was the intention.

Mr. Lewis: Mr. Horne, will you find for me the transfer——

Mr. Drewes: Mr. Lewis, I beg your pardon. I want to offer that book into evidence.

Mr. Lewis: Okay, fine. I thought you had finished.

The Court: Admitted.

The Clerk: United States Exhibit No. 14 in evidence.

(Thereupon document identified above was received in evidence and marked U. S. Exhibit No. 14.)

Mr. Drewes: I have no further questions.

The Court: Are there any other questions of this gentleman?

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Horne, will you find for me the transfer from the notes payable account to the stock transfer account? A. (Indicating.)

(Testimony of George Horne.)

Q. That was in December? A. 1948.

Q. January, 1948? A. Yes.

Q. Were you employed throughout that time for the corporation? A. Yes, I was. [20]

Q. As certified public accountant?

A. Yes.

Q. Have you audited the books to find the value of that stock as of December 31, 1947?

A. Pardon me, I didn't hear the question.

Q. Did you make an audit of the books of the corporation, Asturias Import-Export Corporation, from which you could tell us the value of that stock as of December 31, 1947?

Mr. Drewes: I object on the grounds it is immaterial, irrelevant.

The Court: Overruled. Did you make such an audit?

The Witness: No, sir.

Q. (By Mr. Lewis): Have you the minute books of the corporation? A. No, sir.

Q. Do you know who has? A. No, sir.

Q. Do you know of your own knowledge that this second \$5,000 payment, December 13, 1946, was a loan? A. Did I know it?

Q. Yes. A. As a loan?

Q. Of your own knowledge.

Mr. Drewes: That is objected to as asked and answered. He testified it was a capital [21] contribution.

Mr. Hagerty: No, I believe he said——

The Court: I will allow the question.

(Testimony of George Horne.)

Mr. Lewis: He put it on the books as the note payable account.

A. From an accounting standpoint that is the only way you could handle it until such time as the stock was actually issued or permit granted for the issuance of stock.

Q. (By Mr. Lewis): Well, do you know what it was intended to be or what it actually was when you made the journal entry December 13, 1946?

A. It was intended to be a capital contribution.

Q. How do you know that?

A. From the conversations at the time it was made.

Q. Why did you enter it on the notes payable account?

A. Because it could not be entered as a capital account until stock was actually issued. There is a period there when the contribution is made and application is made to the corporation commissioner for a permit to issue stock. Until such time as the stock is actually issued I believe the stockholder could withdraw the amount as contributed. After the stock is issued he would not be able to withdraw it.

Q. Did the corporation ever—was the corporation ever in a position to remit, pay him back the amount?

A. I can't answer that question. [22]

Q. Have you in your office any of the audits which you made of this corporation?

A. I have financial statements.

(Testimony of George Horne.)

Q. Can you bring those into court tomorrow, Mr. Horne? Will you bring those financial statements into the court in the morning?

A. Which financial statements do you want?

Q. I want them for the years 1946, 1947, 1948.

A. I have some statements in my possession, in my briefcase.

Q. Could I look at them?

A. Sure (showing to counsel).

Q. Is this on a calendar year—

A. The corporation was on a fiscal year.

Q. That year ended June the 30th?

A. That's right.

Mr. Lewis: Could I look at this just one moment?

The Court: Yes.

(Thereupon, upon the customary admonition to the Jury, an adjournment was taken until 10 o'clock a.m., Tuesday, September 17, [23] 1952.)

September 16, 1952, at 10:00 A.M.

The Clerk: United States vs. Olender. The office has received word from Betty Duncan, No. 2 alternate juror, that she has suffered a gallbladder attack and will be unable to attend court.

The Court: May it be stipulated, gentlemen, that the Juror mentioned by Mr. McGee, the Clerk of the Court, may be excused by the panel from further service in this case?

(So stipulated.)

The Court: The case then may continue with the 12 original jurors empaneled and sworn, as well as the one alternate juror.

GEORGE HORNE

was recalled as a witness on behalf of the Government, previously sworn.

Cross-Examination

(Continued)

By Mr. Lewis:

Q. Mr. Horne, yesterday afternoon, I asked you this question: "Did you make an audit of the books of the corporation of Asturias Import-Export Corporation from which you could tell us the value of that stock as of December 31, 1947?"

And your answer was "No, sir."

Would you like to change that testimony? [24]

A. No.

Q. I have already shown this affidavit to counsel, your Honor. I have here an affidavit. Are you familiar with that?

The Court: Are you familiar with that document?

A. Yes, I am.

Q. (By Mr. Lewis): Will you tell me what it is?

A. I don't know what you would call it, but I imagine it would be an affidavit in regard to the transactions of Asturias Import-Export.

Q. Who made the affidavit? A. I did.

Q. Now, Mr. Horne, in this affidavit which is

(Testimony of George Horne.)

dated the 5th day of October, 1951, and made by you, you state, and I quote:

“As of December 31, 1947, corporation was, in my opinion, hopelessly insolvent. No action was taken by the interested parties—stockholders, creditors or management—to procure the dissolution of the corporation or put it in bankruptcy because of the apparent futility of any action that might have been taken. In my opinion, any interest held in the corporation whether evidenced by capital stock, note or creditor’s claim was totally worthless as of December 31, 1947.”

Is that statement true or not? [25]

A. That is my opinion.

Q. Did you ever use any other surname than Horne? A. Last name you mean?

Q. Yes. A. Yes.

Q. What was that? A. Horenstein.

Mr. Lewis: That is all.

Redirect Examination

By Mr. Drewes:

Q. Mr. Horne, at whose request did you prepare the affidavit from which counsel has just read?

Mr. Lewis: Object to that, your Honor, as incompetent, immaterial and irrelevant.

The Court: Overruled.

Mr. Drewes: You may answer.

A. I believe it was at the request of the attorney that wanted to ascertain certain facts.

Q. What attorneys?

(Testimony of George Horne.)

A. I don't recall the name of the attorney, but I believe the attorney's name was on the statement.

Q. Who did he represent?

The Court: If you know.

A. I don't really remember at that time whether he represented Mr. Olender or whether he was a representative of Mr. Yabroff, Dr. Yabroff. [26]

Q. Who was Dr. Yabroff?

A. He was one other stockholder.

Q. In any event, the affidavit was not prepared at the request of the Government?

A. No, it was not.

Mr. Drewes: I have no further questions.

Recross-Examination

By Mr. Lewis:

Q. You swore to the truth of the affidavit, didn't you? A. I beg your pardon?

Q. You swore to the truth of the statement?

A. Oh, yes.

Mr. Lewis: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Drewes: If your Honor please, in my opening statement I referred to a stipulation which had been entered into between counsel for the government and counsel for the defendant in this matter. At this time I should like to offer the stipulation in evidence and ask that it be marked accordingly, the Government's next in order. I have a copy for the Court if you wish it. At this time, your Honor, I

should like to read it for the record for the benefit of the ladies and gentlemen of the Jury.

The Court: Ladies and gentlemen, counsel for the [27] Government has offered a stipulation in writing signed by the attorneys representing the respective parties to this case, that is, the Government and the defense counsel.

A stipulation has the same force as evidence when entered into formally and with the consent of the parties, and counsel may now read into the record such parts thereof as he desires, and counsel for the defendant similarly may rely upon the stipulation.

A stipulation sometimes saves a great deal of time in the trial of a case. It may be marked.

The Clerk: United States Exhibit No. 15 in evidence.

(Thereupon the stipulation was received in evidence and marked United States Exhibit No. 15.)

Mr. Drewes: The stipulation in part is as follows, ladies and gentlemen, and as I have also indicated the Government, at the proper time in the case, will endeavor to pull the various items together in a more helpful fashion for you.

“This stipulation is entered into by and between the parties to this proceeding (by their respective counsel). The parties are bound by this stipulation for the purposes of this proceeding only, and this stipulation does not preclude either party from offering evidence of any character bearing on or related to wilfulness or lack of wilfulness, or [28] any evidence relating to items of assets, liabilities

or expenditures of Milton H. Olender or Mrs. Betty Olender which are not included in this stipulation. Each party shall have the right to show the sources involved in items in this stipulation.

“1. On the dates shown below Milton H. Olender and his wife, Mrs. Betty Olender, owned the following assets and owed the following liabilities (both at cost):

“Specified assets and liabilities of Milton H. and Betty Olender at close of years 1944, 1945 and 1946.

“Assets. Army and Navy Store (not on books).
Cash in store registers——”

Now, each year which I referred to will, of course, be as of the 31st day of December of that year, the close of that specific year.

“1944, \$2,500. 1945, \$1,000. 1946, \$1,000.

“Cash in bank (net after outstanding checks)
1944, \$19,881.55. 1945, \$28,412.31. 1946, \$2,598.38.

“Merchandise inventory: 1944, \$85,011.26. 1945, \$83,394.64. 1946, \$57,449.59.

“Furniture and fixtures (net after depreciation):
1944, \$1,264.60; 1945, \$393.29; and nothing for 1946.
Then again the totals: \$106,157.41 for [29] 1944;
\$112,200.24 for 1945; 1946, \$60,047.97.”

And then the net liabilities of the store:

“Accounts payable \$14,362.70 for 1944. 1945,
\$8,074.74. 1946, \$2,204.27.

“Notes payable, 1944, \$13,500. 1945, \$13,500.
1946, nothing.

“Federal Old Age Taxes, 1944, zero; 1945, zero;
1946, \$21.50.

“State Unemployment Taxes, 1944, \$462.23; 1945, \$825; 1946, \$21.50.

“Withholding Taxes, 1944, zero; 1945, zero; 1946, \$386.05.”

Then the total liabilities as of 1944, are \$28,324.93. 1945, \$22,399.74. 1946, \$2,633.32.

Then the net investment for the store: “1944, \$77,832.48. 1945, \$89,800.50. 1946, \$57,414.65.”

Now, additional assets:

“Cash in bank (other than commercial account Army and Navy Store): Bank of America, Oakland Main Office; Checking accounts——”

And there are two:

“Milton H. Olender 1944, \$277.22. 1945, \$8,253.03. 1946, \$5,477.13.”

Then, in an account entitled, or in the name of:

“Olender and Alkus: 1944, \$434.58; 1945, \$90.28; 1946, \$2,911.74.” [30]

And now follow four or five savings accounts:

“Milton H. Olender, trustee for James Harold Olender: 1944, zero; \$5,000, 1945; 1946, \$5,050.12.

“Milton H. Olender, trustee for Richard Raymond Busby: 1944, zero; 1945, \$5,000; 1946, \$5,050.12.

“Milton H. Olender, trustee for Audrey Elaine Olender: 1944, zero; 1945, \$5,000; 1946, \$5,050.12.

“Mrs. Betty Olender, 1944, zero; 1945, \$5,000; 1946, \$10,070.06.”

Then an account in:

“Bank of America, Fresno Main Office, savings account number 129, Milton Olender, 1944, \$3,111.09; 1945, \$3,142.27; 1946, \$3,173.76.”

Now, the total of those items consisting of various bank accounts is as follows:

“1944, \$3,822.89; 1945, \$31,485.58; 1946, \$36,783.05.”

Now, next is a series of items, for the most part stocks of one kind and another, as follows:

“Bank of America, common, 1944, zero; 1945, zero; 1946, \$37,437.50.

“Kingston Products Company, common, 1944, zero; 1945, zero; 1946, \$850.

“Blair and Company, Inc., common: 1944, [31] zero; 1945, \$812.50; 1946, \$1,187.25.

“Compania Azucarera Vicana, 1944, zero; 1945, \$337.50; 1946, \$337.50.

“Victor Equipment Company, 1944, zero; 1945, zero; 1946, \$570.15.

“Contra Costa Associates, 1944, zero; 1945, zero; 1946, \$5,000.”

Finally, under this particular section:

“Packard Motors Company, common, 1944, \$552.95; '45 and '46, zero, zero.”

The totals of these figures areas follows:

“1944, \$552.95; 1945, \$1,150; 1946, \$45,382.40.”

The next item:

“United States savings bonds, series E, 1944, \$693.75; 1945, \$768.75; 1946, \$768.75.”

The next item:

“Real estate and improvements (exclusive of Army-Navy Store): 1944, \$35,275; 1945, \$35,275; 1946, \$71,261.31.”

Now, from these figures are taken accumulated

depreciation as reported on tax returns in the following amounts:

“1944, \$3,675; 1945, \$4,400; 1946, \$2,750.”

Which gives us the following net figures for real estate:

“1944, \$31,600; 1945, \$30,875; and 1946, \$68,511.31.”

Now, the next item is: [32]

“Paid up life insurance with New York Life Insurance Company, 1944, zero; 1945, \$15,833.46; 1946, \$15,833.46.”

“Loans receivable Contra Costa Associates; 1945 and 1944, zero, zero, and in 1946, \$1,000.”

“Household furniture (except purchased from W. & J. Sloane): 1944, \$5,000; 1945, \$5,000; 1946, \$4,000.

“Household furniture (purchased from W. & J. Sloane, 1944, zero; 1945, zero; 1946, \$24,701.67.”

Then follows two items only of liabilities.

“Loans payable—Mrs. J. Olender, 1944 and 1945, \$5,000; 1946, \$15,500.

“Account payable—W. & J. Sloane, 1944 and 1945, zero, zero, and 1946, \$24,701.67.”

Next, the stipulation reads as follows:

“2. It is stipulated that Milton H. Olender and his wife, Mrs. Betty Olender, had in their possession at the close of the years involved United States Treasury bonds in the face amount set forth below. Each party shall have the right to offer evidence as to the ownership or source of the funds with which the bonds were purchased.”

Now, there are four such items. They are all United States Treasury Bonds. The first: [33]

“U. S. Treasury 2 per cent 1951-53: 1944, '45, '46, the amount is \$10,000 in each case.

“United States Treasury two and one-quarter per cent 1959-62: 1944, zero; 1945, \$58,000; 1946, \$33,000.

“U. S. Treasury two and one-quarter per cent 1956-59; \$1,000 in each year.”

And finally:

“United States Treasury 2 per cent 1952-54, \$13,000 as to each year.”

The totals of those particular items are as follows:

“1944, \$24,000; 1945, \$82,000; 1946, \$57,000.”

The next item of the stipulation is as follows:

“During the years 1945 and 1946 Milton H. Olender and Mrs. Betty Olender, his wife, made expenditures which were not deductible for Federal Income tax purposes in the following amounts:—”

These are non-deductible items—“1945, \$19,081.32; 1946, \$23,985.63.”

Now, the figures which I have just read included Federal income taxes, which as you also understand, are non-deductible items.

The final section of the stipulation sets forth a number of items which were not included in the stipulation and I shan't read those to you. Possibly counsel for the defendant wishes to. [34]

BENJAMIN H. NEIDEN

was called as a witness on behalf of the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury?

A. My present occupation, sir?

Q. Yes.

A. Benjamin H. Neiden, residing at 48 Margaret Drive, Walnut Creek. Manufacturer's representative, women's apparel.

Direct Examination

By Mr. Drewes:

Q. Mr. Neiden, during its active existence you were associated with the Asturias Corporation, were you? A. I was, sir.

Q. In what capacity?

A. I was vice president, treasurer and general manager of the corporation.

Q. In response to a subpoena duces tecum which was served upon you have you brought with you the stock records book of that corporation?

A. I have, sir.

Q. May I see it, please?

(Thereupon the witness handed the document above-referred to to Mr. Drewes.)

Q. (By Mr. Drewes): Has this record been in your possession since you were associated with the corporation? [35]

(Testimony of Benjamin H. Neiden.)

A. It was, with the exception of a short period of time during which it was in the possession of Jefferson E. Peyser, who was attorney for the corporation.

Q. He was attorney for the corporation?

A. He was attorney for the corporation.

Q. Did Mr. Peyser hold any other position? Was he an officer of the corporation?

A. I believe he was secretary, but I would have to check the records of the minutes. I believe he was secretary of the organization. I can check that if that is of importance to you.

Mr. Drewes: At this time the Government will offer in evidence the stock record book of the Asturias Import Export Corporation.

The Court: So ordered.

The Clerk: United States Exhibit No. 16 in evidence.

(Thereupon the document above referred to was received in evidence and marked United States Exhibit No. 16.)

Mr. Drewes: I should like to call the attention of the Jury, your Honor, that certificate number 3 of this stock book, the stub proffering certificate number 3 indicates that 500 shares were issued to Milton H. Olender, July 17, 1946. The certificate reads as follows; continuing from that point:

“From whom transferred, originally dated July, 1946”—the further, “number original certificate 3. [36] Number original shares, 500.”

(Testimony of Benjamin H. Neiden.)

Following "Received certificate number 3 for 500 shares this blank day of blank, 1946" not signed.

Certificate number 12 likewise is for 500 shares issued to Milton H. Olender dated July 23rd, 1947. The other blanks are not filled in. Attached to both certificates No. 3 and No. 12 are United States Internal Revenue stamps in the amount of \$5.50.

Q. (By Mr. Drewes): Have you also brought with you the minutes of the Asturias Corporation?

A. I have.

Q. May I see them, please?

(Thereupon the witness handed the document referred to above to Mr. Drewes.)

Mr. Drewes: Stipulated that the minutes may go into evidence as the Government's next in order.

The Court: So ordered.

The Clerk: United States Exhibit No. 17 in evidence.

(Thereupon the minutes above referred to were received in evidence and marked United States Exhibit No. 17.)

Mr. Drewes: I should like to read, your Honor, from the minutes of two meetings of the Board of Directors of the corporation.

Ladies and gentlemen, the following appears from the records of a special meeting of the Directors of the Asturias Corporation which was held on the 23rd day of April, 1947, [37] at 4:15 p.m. at Room 614 of the Mills Building in San Francisco:

(Testimony of Benjamin H. Neiden.)

“The president then called attention to the action of the stockholders authorizing the application for the issuance of all unissued capital stock of this corporation to the public for cash less a selling commission not to exceed 20 per cent.

“He also called attention to the action of the board of directors on February 17th, 1947, whereby application was filed for the issuance of 1500 shares for cash to the following named persons. 600 shares to Mildred Lane, 500 shares to Milton H. Olender, and 400 shares to Ray Monson. He indicated that the application had not as yet been filed and therefore suggested that one application be filed for said shares and the balance of shares outstanding.

“On motion duly made, seconded and carried the following resolution was unanimously adopted.

“ ‘Be it resolved that the vice president of this corporation be, and he is hereby authorized to make application to the Commissioner of Corporations for the issuance of the following shares of the capital stock of this corporation as follows: [38]

“ ‘1500 shares for cash to the following named persons to net the corporation one hundred per cent thereof.

“ ‘600 shares to Mildred Lane, 500 shares to Milton H. Olender, 400 shares Ray Monson.’ ”

And the earlier action of the Board referred to in that resolution which I have just read to you is found in the minutes of the special meeting which

(Testimony of Benjamin H. Neiden.)

was held the 17th day of February, 1947, at the hour of 10:50 p.m. at Room 614 in the Mills Building, San Francisco, California, and I will read this part of it:

“On motion by Director Yabroff, seconded by Milton H. Olender the following resolution was unanimously adopted.

“Be it resolved the Secretary of this Corporation be, and he is hereby authorized to make application to the Commissioner of Corporations for the issuance of 3000 shares of the capital stock of this corporation as follows:

“1500 shares for cash to the following named persons:

“600 shares to Mildred Lane, 500 shares to Milton H. Olender, 400 shares to Roy Monson.”

I should also like to read briefly a resolution which is found in the minutes of a special meeting of the board of [39] directors which was held on the 31st day of July, 1947, at Room 614, Mills Building, San Francisco, as follows:

“On motion made by Milton H. Olender, seconded by Jefferson E. Peyser, the following resolution was presented.

“Be it resolved that as at the close of business July 31, 1947, this corporation cease all operations, and that the manager be instructed to incur no further obligations of any kind or character, and be it further resolved that the office of said corporation be closed and the premises vacated——”
and so forth.

(Testimony of Benjamin H. Neiden.)

Q. (By Mr. Drewes): Mr. Neiden, have you also brought with you a copy of the annual report of the corporation as of July, 1947?

A. I have.

Q. May I see, that, please?

(Thereupon the witness handed the document above referred to to Mr. Drewes.)

Mr. Drewes: United States will offer the copy of the officers' annual report as the Government's next in order.

The Court: It may be marked.

The Clerk: United States Exhibit No. 18 in evidence.

(Thereupon the document above referred to was received in evidence and marked United States Exhibit No. 18.)

Mr. Drewes: I read very briefly from the first page of [40] the annual report of this corporation as follows:

“At the December, 1946, meeting it was agreed that the balance of the shares of stock of this corporation be sold and the factory purchased by the Asturias Import Export Corporation. At this meeting \$19,400 was loaned by our stockholders to our corporation. These notes were to be exchanged for stock certificates when the stock permit was granted.”

I have no further questions of this witness.

(Testimony of Benjamin H. Neiden.)

Cross-Examination

By Mr. Lewis:

Q. Mr. Neiden, I hand you the stock book of the Asturias Import Export Corporation, and with reference to stock certificates 3 and 12 you will note Mr. Olender did not sign for the stock on the stub there. Have you any way of telling when Mr. Olender received his stock?

A. No, I have no way of telling you exactly the date that stock was received.

Q. Are you familiar with the financial affairs as the president, manager, or vice president and manager of the corporation?

A. I would say so, yes.

Q. Do you know what the financial position of the company was on December 31, 1947?

Mr. Drewes: Objected to as irrelevant. [41]

The Court: Overruled.

Q. (By Mr. Lewis): Do you know what the financial position of the corporation was as of December 31, 1947?

A. Do you wish me to answer that question?

The Court: Yes.

A. We had ceased operations in July 31, 1947. At that time this company was definitely in financial jeopardy. The indebtedness of Asturias Import Export Corporation ran somewhere between \$6,000 and \$7,000. I do not have the exact figures here, but I am sure that can be ascertained from the records of the corporation.

(Testimony of Benjamin H. Neiden.)

It was felt, apparently, by the Board of Directors that the organization could not proceed further and was either insolvent or additional capital had to be added. The corporation did not continue active function after July 31, 1947.

Mr. Lewis: That is all.

The Court: What is your definition of insolvent? You said the corporation was insolvent. What is your definition?

The Witness: The inability to meet current obligations.

The Court: As they matured?

The Witness: As they matured.

Redirect Examination

By Mr. Drewes:

Q. Stock certificate number 3, Mr. Neiden, bears the date July 17, 1946, in the same handwriting, ink, in which the balance of the stub is filled out and I show you [43] that number 12 bears the date July 23, 1947. Do you have any reason to doubt the accuracy of those two dates? A. I do not.

Mr. Drewes: No further questions.

Mr. Lewis: No further questions.

The Court: You are excused.

(Witness excused.)

MONROE L. CAHN

was called as a witness on behalf of the Government, sworn.

The Clerk: Will you state your name, your address and your occupation to the Court and to the Jury?

A. Monroe L. Cahn, 72 Seventh Avenue, San Francisco; credit manager, I. Magnin and Company.

Direct Examination

By Mr. Drewes:

Q. Mr. Cahn, you have appeared here in response to a subpoena duces tecum. You were asked to bring with you the records of I. Magnin and Company with respect to the accounts of Milton Olender and/or his wife, Mrs. Betty Olender, for the years 1945 and '46. Have you brought those records with you? A. No, sir.

Q. Why not?

A. We don't have them any longer.

Q. What has happened to the records? [43]

A. Well, we usually keep our records for four years and after that they are destroyed.

Q. And the records to which I have referred have been destroyed pursuant to the policy of Magnin's that you have outlined? A. Yes, sir.

Mr. Drewes: I have no further questions.

Mr. Lewis: No questions.

The Court: Do you have microfilms of the records?

(Testimony of Monroe L. Cahn.)

The Witness: We do now because we shifted our billing system about a year ago.

The Court: But you haven't any micros of the accounts in question?

The Witness: No.

Q. (By Mr. Drewes): You kept no copies of any kind of those records?

The Witness: Well, we don't have the original ledger sheets.

Mr. Drewes: And you have no copies of those ledger sheets?

The Witness: I haven't, no.

Mr. Drewes: Does the company have?

The Witness: No.

Mr. Drewes: Will you wait a few minutes until the next witness is finished? [44]

VIRGINIA DAVIS

was called as a witness on behalf of the plaintiff, sworn.

The Clerk: State your name, your address and your occupation to the Court and to the jury.

A. Virginia Davis, 1000 Green Street. I am a medical secretary.

Direct Examination

By Mr. Drewes:

Q. Mrs. Davis, in 1948 were you employed by I. Magnin and Company in San Francisco?

A. I was.

(Testimony of Virginia Davis.)

Q. Were you so employed throughout that year?

A. Yes.

Q. In what capacity were you employed by that company?

A. I was in the credit department in charge of the correspondence, anything to do with credit complaints or inquiries.

Q. Would you tell us a little bit further specifically what your duties were? What type of inquiries, for example?

A. Well, inquiries as to accounts that would come in or errors on accounts, and then I would have to take——

Q. What did you do, for example, when an inquiry as to errors would come in?

A. Check the information in the letter against the ledger, and then inform the person as to whether it was correct or to be corrected or what the error was.

Q. The inquiries coming in were referred to you? [45]

A. Well, to myself and others.

Mr. Hagerty: Just a moment, please. If your Honor please, I will object to this line, that is subject to a motion to strike, on the grounds that the present time is incompetent, irrelevant and immaterial.

The Court: You reserve your motion, counsel.

Mr. Drewes: I am laying a foundation.

The Court: To all of this testimony.

Q. (By Mr. Drewes): Some of the inquiries received were referred to you?

A. Yes.

(Testimony of Virginia Davis.)

Q. Then what did you do? You prepared the replies yourself? Did you dictate the replies?

A. Yes, I did.

Q. And did you personally gather the information requested in the inquiries referred to you?

A. Yes.

Q. Did you always do the work yourself or did you sometimes——

A. Not always, no.

Q. You referred some of the work to others?

A. That is correct.

Q. And when the work was done did you check it?

A. Yes.

Q. I want to show you a letter dated November 9, 1948, on [46] the letterhead of I. Magnin and Company and ask you if you recognize the signature thereon?

A. Yes, that is my signature.

Q. The signature of Virginia Born. I take it, Mrs. Davis, you have married since that time?

A. Yes, I have.

Q. And will you please examine the enclosures. You will note that the original letter has marked "enclosures," and attached thereto are some papers. Will you tell me what those are?

Mr. Hagerty: Just a moment, I will object. I haven't seen it. May I see it, please?

Mr. Drewes: It hasn't been offered in evidence, yet.

The Court: Counsel may examine it.

Mr. Hagerty: I have a right to see it before she starts testifying from it.

(Testimony of Virginia Davis.)

(Thereupon Mr. Drewes gave the document above referred to to Mr. Hagerty.)

The Court: Ladies and gentlemen, we might take the morning recess at this time with the same admonition not to discuss the case under any condition or circumstances, and not to form an opinion until the matter is submitted to you.

(Short recess.) [47]

Mr. Hagerty: For the purposes of the record, I will renew my objection as to this witness testifying from these documents before me in any respect on the grounds that they are hearsay, they are not records kept in the regular course of business.

The Court: May I see them?

Mr. Hagerty: Yes.

They are not the best evidence because they are not the original records.

The Court: The foundation has been laid in light of the absence of the original records.

Mr. Drewes: That is my purpose, your Honor, my intention.

The Court: Objection overruled.

Q. (By Mr. Drewes): Mrs. Davis, you have testified that requests for information as to statements and accounts were sometimes turned over by you to others, to employees of I. Magnin's. When the information requested was returned by those other employees to you, were the original statements included when they were returned to your desk?

A. You mean the original ledgers?

(Testimony of Virginia Davis.)

Q. Yes. A. Not necessarily, no.

Q. Will you please examine the enclosures, Mrs. Davis, and tell me if they appear to be on the letter-head of I. [48] Magnin & Company or if that is the statement of I. Magnin & Company?

A. That is correct.

Q. That is a statement form?

A. That is a statement form.

Q. Now, Mrs. Davis, do you have any recollection as to the preparation of that particular—and signature of that particular letter or the enclosures?

A. I have a slight recollection of Mr. Whiteside's request. I certainly signed it. And, I might add, that in a case of this type I would be liable—most liable to very carefully check the contents.

Q. Do you recall whether or not you actually obtained the information for the preparation of that enclosure or was it done by someone else?

A. No, that was delegated to one of the stenographers.

Q. In a case of that kind would you have checked the accuracy of that statement before signing the letter and mailing it?

A. I am quite certain that I would, yes.

Mr. Drewes: Your Honor, the Government will offer the letter and enclosure into evidence, limited to the purchases shown on the enclosure for the year 1946. It runs beyond 1946. There are some

(Testimony of Virginia Davis.)

items shown in 1947, which, of course, are not [49] material.

The Court: Subject to the objection.

Mr. Hagerty: Might I question the witness a little bit in reference to them first, please?

The Court: Certainly.

Q. (By Mr. Hagerty): Now there are several columns shown on these invoice forms, are there not? A. Yes.

Q. Mrs. Born—is it Virginia Born

A. Yes.

Q. The one column indicates “Returned Merchandise” and “Payments.” You could not tell from those figures whether there had been a cash payment or a return of merchandise, could you?

A. Yes. It is indicated on the first column.

Q. And if the first column does not indicate it, you could not identify the figure in the returned merchandise and payment column?

A. I believe they are all identified.

Q. What?

A. I believe they are all identified, either as returned merchandise or cash, which was a word used for any payment to account.

Q. You yourself testified that you did not make these forms up, did you?

A. I honestly don't remember if I made those particular forms [50] up. I couldn't say that I did. I imagine it was done under my direction.

Q. You imagine. Now you worked in the San Francisco store, did you not? A. Correct.

(Testimony of Virginia Davis.)

Q. And by the context of this letter these records purport to be records of the Oakland store, don't they?

A. That's correct, and a portion of San Francisco.

Q. A portion of San Francisco?

A. (Witness nods head in the affirmative.)

Q. These original records then should have been kept in the Oakland store, is that not right?

A. They could have been but we also did billing for Oakland at one period. I am not quite concise on exactly when.

Q. In other words, you don't know whether these records were kept in San Francisco or in the Oakland store, do you?

A. I couldn't swear to it.

Q. And, in fact, everything that you testified to about these records is pretty much a matter of doubt in your mind, is that not right?

A. Well, I wouldn't exactly call it doubt. I must have seen the records or at least the statement that you hold in your hand or I wouldn't have written the letter to cover them.

Q. I mean as you sit there do you know even, though, the years pertaining to them—do you [51] know? A. Yes, I do, from 1946 to 1948.

Q. '46 to '48? A. Uh-huh.

Q. Do you know the name of the account?

A. Yes.

Q. What is the name?

A. Olender—(spelling) O-l-e-n-d-e-r.

(Testimony of Virginia Davis.)

Q. I see. Do you know whether Mr., Mrs., or Miss?

A. Mrs. Olender, I believe.

Q. Mrs. Did you know that Miss Olender used the account, too?

A. I don't recall that specific thing.

Q. You could not tell from these documents whether or not the purchases were made and paid for by Miss Olender who is an emancipated minor, would you?

A. No.

Q. How did you go about first preparing this record; what was the first thing that brought this about?

A. Well, it should have been a request from Mr. Whiteside or from the Oakland store, probably, to the credit office and then referred to me for compiling figures necessary.

Q. You don't know whether Mr. Whiteside came to you and made the request or——

A. No, I don't.

Q. ——or whether he had gone to the Oakland store. [52]

A. I know Mr. Whiteside didn't come to me. I don't remember seeing him before it must have come through.

Q. You know who Mr. Whiteside is?

A. Yes, I do.

Q. And this is probably the first time you have ever seen him?

A. Yes.

Q. Although you had written a letter addressed to him?

A. That is correct.

Mr. Hagerty: No further questions.

(Testimony of Virginia Davis.)

Mr. Drewes: The Government will renew its offer at this time.

The Court: The offer may now be marked in evidence subject to the limitations, that is to say, for the year 1946.

Mr. Drewes: 1946.

The Clerk: United States Exhibit No. 19 in evidence with the limitation stated.

(Letter and enclosure referred to were marked U. S. Exhibit No. 19 in evidence.)

Mr. Drewes: I have no further questions.

The Court: The witness is excused?

Mr. Drewes: The witness is excused.

Mr. Lewis: Yes.

Mr. Hagerty: Yes. [53]

(Witness excused.)

Mr. Drewes: May I state for the record, your Honor, that the exhibit which has just been admitted into evidence for the year limited to the year 1946 shows aggregate payments on the account in the amount of \$863.73.

Mr. Hagerty: We will stipulate to that, your Honor.

LOUIS H. MOOSER, JR.

called on behalf of the Government, and having been previously duly sworn, testified further as follows:

The Court: This witness has been sworn.

The Clerk: Mr. Mooser, will you please restate your name?

A. Louis H. Mooser, Jr.

(Testimony of Louis H. Mooser, Jr.)

Direct Examination
(Resumed)

By Mr. Drewes:

Q. Yesterday, Mr. Mooser, you were asked to return today and bring with you the 1946 partnership return of the Olender, Gambor, et al., partnership. Do you have that with you?

A. Yes, sir, (producing).

Mr. Drewes: The partnership return of 1946, which has just been identified, your Honor, we ask that it be marked for identification.

The Court: So ordered.

The Clerk: U. S. Exhibit No. 20 for identification only. [54]

(Thereupon 1946 partnership return referred to was marked U. S. Exhibit No. 20 for identification only.)

Q. (By Mr. Drewes): Mr. Mooser, apparently there was a slight misunderstanding, confusion, yesterday. I asked you, you may recall, if you had brought with you the 1942 return of the Army-Navy Store in Oakland, and you told me that you had not. However, just prior to that, you may recall, you had handed me a group of returns for Mr. and Mrs. Olender for earlier years and subsequently found this return which had been marked Exhibit 6 (handing to witness). I will ask you if that is the Army-Navy return which you brought with you yesterday?

A. Yes, it is.

Q. Thank you.

(Testimony of Louis H. Mooser, Jr.)

We will renew our offer as Exhibit 6.

Mr. Lewis: Object to it, your Honor, as being beyond the issues of the case. This is 1942 return——

Mr. Drewes: Your Honor, that is——

Mr. Lewis: It is incompetent, immaterial, irrelevant.

Mr. Hagerty: The indictment is limited to 1945 and '46. This is 1942.

The Court: What is the purpose of it, counsel?

Mr. Drewes: Yes, your Honor. Your Honor has already admitted into evidence a number of other returns for the years—one on the 1942, and two for '43 and '44. As I [55] stated in my opening remarks, the base year is 1942—pardon me, 1944. However, we wish to support that by putting into the record the income taxes of the gross income reported and taxes paid by the taxpayers beginning in 1942 because, as will later appear, we will offer into evidence a net worth return for the year 1941 prepared by the taxpayer and, of course, by adding purported income from 1941 to 1944 we will support our 1944 base year, and that is the base.

The Court: For that purpose it may be admitted, and, counsel, you will have for the purpose of illustration and in order to follow the sequences in evidence a graphical representation or a chart of some kind.

Mr. Drewes: Yes. At the proper time we will attempt to bring all of our evidence together so that it will have meaning for the jury.

(Testimony of Louis H. Mooser, Jr.)

The Court: So the jury will have it correlated in some form.

Mr. Drewes: I fully appreciate that our stipulation was not totalled either, and we did not total it because there is more evidence to come in. When the Government has rested, we will put it all together and show what we contend we have proved.

The Court: That exhibit may be marked appropriately.

The Clerk: What is the exhibit?

Mr. Drewes: It will be offered as marked, No. 6, and we [56] reoffer No. 6.

The Clerk: United States Exhibit No. 6 now in evidence.

(Thereupon U. S. Exhibit No. 6 was received in evidence.)

Q. (By Mr. Drewes): Now, Mr. Mooser, have you also brought with you certificates of assessment and payments for the years 1942 through 1947 for Milton Olender and Betty Olender?

A. Yes, I have.

Q. May I see them, please?

A. (Witness producing.)

Mr. Drewes: It has been stipulated, your Honor, that these certificates of assessment may go into the record.

I will offer the certificate as to Milton and Mrs. Olender for the years 1941 and '42 first and ask that they be admitted separately.

The Court: It may be marked.

(Testimony of Louis H. Mooser, Jr.)

The Clerk: U. S. Exhibit No. 21 in evidence.

(Thereupon certificate of assessment referred to was marked United States Exhibit No. 21 in evidence.)

Q. (By Mr. Drewes): And next a certificate as to Milton Olender.

The Court: So ordered.

The Clerk: U. S. Exhibit No. 22 in evidence.

(Thereupon certificate referred to was received in evidence and marked U. S. Exhibit No. 22.) [57]

Mr. Drewes: Finally as to Mrs. M. H. Olender—

I might state for the jury, your Honor, that certificates of assessment and payments are simply certificates prepared by the office of the Collector setting forth as to the taxpayer the appropriate years the estimated tax for each year and the tax actually paid, and that is simply a record for the appropriate years of the taxes estimated and paid by the defendant and by Mrs. Olender.

The Clerk: U. S. Exhibit No. 23 in evidence.

(Thereupon certificate of assessment referred to was received in evidence and marked U. S. Exhibit No. 23.)

Mr. Drewes: Mr. Lewis just pointed out to me as to the year 1945 included in this particular exhibit we also included the figures in the stipulation.

(Testimony of Louis H. Mooser, Jr.)

He wanted to be sure that we didn't count them up twice. In his behalf I make that statement.

I have no further questions of Mr. Mooser.

The Court: This witness is excused. Thank you.

(Witness excused.)

CHARLES R. RINGO

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and jury.

A. Charles R. Ringo, 540 Arlington Avenue, Berkeley, [58] California, attorney-at-law and certified public accountant.

Direct Examination

By Mr. Drewes:

Q. You are a certified public accountant, Mr. Ringo? A. I am.

Q. And Mr. Ringo—

Mr. Hagerty: I would like to make an objection to any testimony from this witness at this time, your Honor, on the ground of privilege. He is an attorney-at-law and the defendant was a client of his, and under the circumstances it is a privileged communication, and I don't think under the law he is entitled to make any statement here from the stand against this defendant.

The Court: Let me have the foundation first. I will reserve my ruling.

Q. (By Mr. Drewes): And where are your offices, Mr. Ringo?

(Testimony of Charles R. Ringo.)

A. At 1212 Broadway in Oakland.

Q. With whom are you associated, if anyone?

A. D. A. Sargent & Company.

Q. D. A. Sargent & Company, and what is their business?

A. Certified public accountants.

Q. You are also an attorney-at-law?

A. I am.

Q. You are admitted to practice in the State of California?

A. I am admitted to practice in the State of California. [59]

Q. When were you so admitted? A. 1943.

Q. 1943? A. Yes.

Q. Is Mr. Sargent an attorney-at-law?

A. No.

Q. How many associates are there in the firm of Sargent & Company?

A. Well, what do you mean associated—associated in what way?

Q. How many partners are there?

A. Well, at the time I worked on this case, just myself and Mr. Sargent.

Q. And I take it from your answer that the staff has been increased since that time?

A. Well, they haven't all been members of the firm.

Q. Is Mr. Sargent an attorney-at-law?

A. No.

Q. Was the firm of Sargent & Company employed by the defendant in the years 1947 or '48?

(Testimony of Charles R. Ringo.)

Mr. Hagerty: Objected to as leading and suggestive, your Honor.

The Court: Overruled.

A. He came to the firm and saw me up there.

Q. (By Mr. Drewes): When was that, approximately? [60] A. In the early part of 1948.

Q. Did Mr. Olender come directly to you or did he go to Mr. Sargent?

A. I believe first he went to Mr. Sargent. Mr. Sargent turned it over to me.

Q. He first went to Mr. Sargent?

A. That's right.

Q. And as a result of Mr. Olender having gone to Mr. Sargent's office, was a contract entered into by the terms of which the Sargent firm undertook to do certain work for Mr. Olender?

A. Well, I don't know just how you mean to express that. There was no written contract on it.

Q. Well, there was an agreement—strike that. As a result of Mr. Olender coming to you the office of the Sargent firm, did an agreement result whereby the Sargent firm undertook to do some work for Mr. Olender?

A. Well, I did all the work on it. If you mean by that—

Q. I take it your answer is that there was an understanding or agreement that you would do some work? A. That's right.

Q. Will you state for the record the type and nature of the work which was requested of you or which you agreed to do?

(Testimony of Charles R. Ringo.)

A. I was requested to help make out a net worth statement, work out his—try to work out his net worth. [61]

Q. His comparative net worth?

A. That's right.

Q. And for what period, if you recall?

Mr. Hagerty: If your Honor please, I will object to this. I think that whatever foundation had to be made out has already been made out. This is going into the material——

The Court: I will allow this last question as to the period.

A. I believe it was 1942 through 1947. Without seeing the figures I would have to refresh my memory.

Q. (By Mr. Drewes): And when you say a comparative net worth, comparative net worth statements, what is entailed in preparing such statements?

Mr. Hagerty: Now,——

Q. (By Mr. Drewes): What kind of work is necessary or required?

Mr. Hagerty: If your Honor please, I will object to this as the foundation having been passed and I will ask permission to ask the witness further questions on voir dire in reference to the arrangements between him and the defendant.

The Court: You may.

Q. (By Mr. Hagerty): Mr. Ringo, you stated to us that you were an attorney and also an accountant, is that true? A. That's correct.

(Testimony of Charles R. Ringo.)

Q. Do you have one of your business cards with you? [62] A. I do.

Q. May I see it? A. (Producing).

Mr. Hagerty: For the purposes of the record, I would like to read this card.

“Charles R. Ringo, CPA,” and underneath it is, “Attorney-at-law,” and under that,

“D. A. Sargent & Company, certified public accountants,” and the address, “1212 Broadway, Oakland, California.”

Q. Is that the same card you had when you first met the defendant, Mr. Olender?

A. That’s correct.

Q. That was the same business card you used?

A. That’s right.

Q. And in prominent letters under your name is the statement being an attorney-at-law?

A. That’s correct.

Q. When you first talked to Mr. Olender did he ask you if you were an attorney-at-law?

A. He did.

Q. And at that time did he tell you he wanted an attorney-at-law who knew something about accounting? A. That’s right.

Q. After you had told him that you were and that you knew both subjects, law and accounting, did he retain you? [63] A. That is correct.

Q. And at that time the relationship of attorney and client was set up?

Mr. Drewes: Well, I submit—I object to that,

(Testimony of Charles R. Ringo.)

your Honor, as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Hagerty: I think that I have laid the foundation, your Honor, for that relationship, and again I will renew my objection to any disclosure by this witness as to any affairs that he conducted or handled for the defendant on the grounds of privilege.

Mr. Drewes: It is my understanding of the law, your Honor, that it is a factual situation. The fact that the witness is a member of the Bar is itself immaterial. The issue is what did he do as a result of his employment. In many, many cases where attorneys——

The Court: What did you do, Mr. Ringo?

A. In the first place I asked Mr. Olender to submit me figures of estimates of his net worth, and then I went over his affairs with him. I will say that all the figures submitted are purely Mr. Olender's figures. There was no chance of auditing here because of the nature of the transactions.

The Court: Your work then resulted in compilation of figures? [64]

A. That's correct.

The Court: The objection is overruled.

Q. (By Mr. Hagerty): Mr. Ringo, you are a specialist in tax matters, is that not true?

A. That's correct.

Q. And you handle the legal accounting end of tax matters?

A. That's correct.

Mr. Drewes: I understood your Honor to rule on the matter.

(Testimony of Charles R. Ringo.)

The Court: Well, he is entitled to ask questions for the purposes of the record if he desires to.

Mr. Hagerty: This is a further amplification of the relationship, your Honor.

Q. And did Mr. Olender hire you as an attorney for that very purpose, to look into his accounting features because of tax problems?

Mr. Drewes: Objected to as calling for——

A. He hired me to look into his tax problems, that's right.

Mr. Drewes: ——as calling for the opinion and conclusion.

Mr. Hagerty: Well, under the circumstances, your Honor, I feel that we have made out a case of the attorney-client relationship.

Mr. Drewes: I ask the last response go out as being [65] the opinion and conclusion of the witness, and I objected and the witness kept on answering.

The Court: Objection overruled. I think the witness may testify.

Mr. Hagerty: I didn't hear your Honor.

The Court: The witness may testify under the circumstances. His testimony is to be limited to accounting matters. And if there be any matters involving the relationship of attorney and client, I will rule on those matters as and when they appear.

Mr. Hagerty: And for the purposes of the record then, your Honor, may we note an exception?

The Court: Yes.

(Testimony of Charles R. Ringo.)

Q. (By Mr. Drewes): Mr. Ringo—

Mr. Hagerty: If your Honor please, as a further consideration of that point, might I put the defendant on himself to tell what his version and understanding of the relationship was?

The Court: Not at this juncture.

Mr. Hagerty: Not at this time.

The Court: No.

Q. (By Mr. Drewes): Mr. Ringo—

Mr. Hagerty: May I for the purposes of the record note a further exception on that, your Honor?

The Court: Yes. [66]

Q. (By Mr. Drewes): To the best of your recollection, Mr. Ringo, when were you first—when were you or the firm of D. A. Sargent & Company first retained by the defendant?

A. The early part of 1948.

Q. And you have already on voir dire testified that you were employed by him for the purpose of constructing comparative net worth statements?

A. That's right.

Q. And what period of time was covered by your work?

A. I believe now that the period I covered was 1942 through 1947. I would have to see the net worth statements to refresh my memory on that, but I believe that is true.

Q. That is your best recollection at the present time? A. That's correct.

Q. In the course of your endeavors did you at-

(Testimony of Charles R. Ringo.)

tempt, Mr. Ringo, to reconstruct the defendant's income for each of those years in question?

A. Well, now——

Q. Just answer the question, Mr. Ringo, and then you can explain any way you wish.

A. It takes a little explaining to show just—to say what I did. I don't want to make a positive statement.

The Court: Answer and then explain.

A. I will say I made some attempts, yes.

Q. (By Mr. Drewes): What method did you use in making—in [67] attempting to accomplish that objective?

A. I first asked Mr. Olender to bring me in, to the best of his recollection, the statements of his net worth for each—at the end of each year showing his figures as he thought they were. Then I got hold of his bank statements, and by talking to him and asking him questions I tried to rearrange these figures so as to get the correct figures for the time, because necessarily on an individual that way it would be absolutely impossible for the individual to come right out now and say, this is it. I was trying to reconstruct.

Q. Why did you ask him to bring net worth figures for each year, Mr. Ringo?

A. In order to reconcile his income with his net worth.

Q. Why did you make an audit—strike that. I take it you did not make an audit of his books and records?

(Testimony of Charles R. Ringo.)

A. No, I did not make an audit of the books and records.

Q. Will you explain why you did not?

A. Well, in a great many of these transactions, they were purely cash transactions by use of currency, and so forth, and it would be impossible to really verify figures.

Q. Then you made a preliminary survey of his books and records and discussed his books and records with Mr. Olender before you undertook to reconstruct these net worth statements, is that correct?

A. The only books and records he had would be on the [68] business. As to his personal affairs, there would be no books and records. But I did look them over, yes.

Q. And you say a great many of these transactions were not on the books and records. What transactions, Mr. Ringo?

A. The personal transactions, outside of the business. He had the Army and Navy Store and there were also a lot of investments and items of that nature which would not appear on the books and records.

Q. That is why I asked you to explain, Mr. Ringo.

A. Which would be common, I think, in most individuals.

Q. Did you audit the books and records of the Army-Navy Store? A. I did not.

Q. Why did you not?

(Testimony of Charles R. Ringo.)

A. Because I wasn't engaged to do that.

Q. Would it not be necessary to audit the books and records of the Army & Navy Store in order to determine the net worth of the taxpayer?

A. Not necessarily audit them. The books and records of the Army-Navy Store seemed to be in pretty good condition and it would not necessarily be unless the taxpayer engaged you to do that, because there you have—even there in your daily receipts there would be cash receipts. I don't know how—or not charged sales,—how you—where there wouldn't be sales tickets or something, how you could verify [69] the sales, for instance.

Q. Did you ask Mr. Olender if the books and records of the Army & Navy Store were complete?

A. I think I did, yes.

Q. And what did he say?

A. The Army-Navy Store, as far as I—as far as we could determine, seemed to be in pretty good condition.

Q. Did you determine, Mr. Ringo, during the course of your study of Mr. Olender's affairs that all of the purchases and sales in connection with the Army-Navy Store were not on the books and records of that store?

Mr. Hagerty: Objected to as being leading and suggestive, your Honor.

The Court: Sustained.

Q. (By Mr. Drewes): Will you state, Mr. Ringo, whether or not you had any conversations with Mr. Olender concerning transactions between

(Testimony of Charles R. Ringo.)

the Army & Navy Store and one George Goodman?

A. Yes.

Q. Where and when did that discussion take place?

A. Oh,——

Q. To the best of your recollection.

A. When the case first came to us, I believe I got together with Mr. Root, to ask him what the Government wanted, and Mr. Root brought out the Army-Navy—the transactions with [70] Goodman & Company—and that was really the start of the entire matter, with the Goodman transaction.

Q. And did you have a discussion with Mr. Olender concerning the Goodman transactions?

A. Oh, plenty of them, yes.

Q. Where did those discussions take place?

A. In my office.

Q. And was anybody else present that you recall?

A. I can't recall anybody else being present, no.

Q. To the best of your recollection will you just state what was said by Mr. Olender and what was said by you with respect to the George Goodman transactions and the Army-Navy Store?

A. Back in 1928—I can't—it's just—just what transactions. We had a list—. These were bought with cashier's checks.

Q. What was bought with cashier's checks?

A. The goods from Goodman.

Mr. Hagerty: I object to this as improper foundation unless the time is fixed.

Mr. Drewes: He testified he had many conversa-

(Testimony of Charles R. Ringo.)

tions in his office following his employment some years ago. No one else present. I believe that is adequate foundation.

The Court: Overruled.

Mr. Drewes: You may answer. [71]

A. Well now, wait a minute, to refresh my memory—what were we trying to say there? We had—in fact, I think Mr. Root gave me a list of the cashier's checks at the time that we—that were used to purchase these goods from Goodman, and we went into the Goodman transactions necessarily on this.

Q. (By Mr. Drewes): What did you ask Mr. Olender about the Goodman transactions and what did he reply?

A. Well, I asked him if he bought these goods from Goodman and what was done with the goods, and they—we never were really able to get the whole story on it. The Goodman transactions weren't entered into the books, as far as we could find.

Q. Did Mr. Olender tell you that, is that your testimony?

A. Finally we found that they were not, yes, and neither were the disposition of them—of the goods.

Q. You determined that the Goodman transactions were not on the books of the Army-Navy Store, is that correct?

A. That's right, the original transaction.

Q. Is it not true that as a result of that deter-

(Testimony of Charles R. Ringo.)

mination that you adopted the net worth approach to analyzing Mr. Olender's affairs?

Mr. Hagerty: Objected to again as leading and suggestive.

The Court: Overruled.

A. Well, we used the net worth approach because I was asked to give a net worth statement by the revenue agent. [72]

Mr. Drewes: I ask——

A. That is what the revenue agent asked for.

Mr. Drewes: ——that be stricken as not responsive.

Mr. Hagerty: I think it is responsive.

The Court: Motion denied. It may stand on the record.

A. At the time they came in, the agent asked for a net worth statement, net worth statements on this matter.

Q. (By Mr. Drewes): You determined, Mr. Ringo, that the books and records of the Army-Navy Store were not complete, did you not?

A. As far as the Goodman transaction, it never went through the books of the Army-Navy Store—either the acquisition or the disposition of it.

Q. Is it not true that an audit of those books would therefore have been unproductive?

Mr. Hagerty: Objected to as being leading and suggestive again and calling for the opinion and conclusion of this witness.

The Court: Overruled.

A. The Goodman—well, in the first place how—

(Testimony of Charles R. Ringo.)

put the question to me again and I will try to answer it for you.

Q. (By Mr. Drewes): You knew that the books and records of the Army-Navy Store did not include all of the transactions?

A. I knew that the Goodman deal was not in there. [73]

Q. And therefore you knew that an audit of those books would have been useless?

A. Well, I was never asked to audit the books in the first place.

Mr. Hagerty: Objected to as leading and suggestive.

The Court: Overruled.

A. I was never asked to audit the books, in the first place, and, of course, they would not reflect the Goodman deal, that's correct.

Q. (By Mr. Drewes): They would not reflect the Goodman deal? A. That's correct.

Q. And therefore the net worth study was the only approach to determining the income of the defendant for the years in question, isn't that correct? A. Well, I imagine it would be, yes.

Mr. Drewes: I wonder if we might take the recess at this time.

The Court: Yes. We will take the noon recess, ladies and gentlemen of the Jury, and we will resume this afternoon at 2:15—fifteen minutes past two. The same admonition to you.

(Whereupon an adjournment was taken until 2:15 o'clock p.m. this date.) [74]

Tuesday, September 16, 1952—2:15 o'Clock P.M.

CHARLES R. RINGO

called as a witness on behalf of the Government,
resumed the stand, previously sworn:

Direct Examination
(Continued)

By Mr. Drewes:

Q. Mr. Ringo, you testified this morning that you were employed by the defendant to construct or reconstruct his earnings for the years 1942 through 1947. I will hand you a document which is entitled "Milton H. Olender, comparative net worth statement of December 31, 1947, and December 31, 1941," and it is also marked in the upper righthand corner "Exhibit No. 1" and I will ask you if you can identify that document?

A. I can.

Q. What is it, Mr. Ringo?

A. It is my attempt to work out the net worth of Mr. Olender at a beginning and an ending period, and I think you will find further in there where I have tried to reconcile that to his income tax returns as to his income, and tie them together.

Q. The document marked Exhibit 1, which is in front of you, is the summation of your work in this connection?

A. It is the summation of the net worth at the beginning and end of those two periods as best I could determine. [75]

Q. Now, I show you similar documents bearing

(Testimony of Charles R. Ringo.)

in the upper right-hand corner Exhibit 2, Exhibit 3, pages 1 and 2, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 7 and Exhibit 7-Schedule A, and I will ask you if you can identify those particular documents. Will you please look at each one, Mr. Ringo?

A. Yes.

Q. Can you identify the documents which I handed you last, Exhibits 2 through 7, inclusive?

A. I can.

Q. What are they, Mr. Ringo?

A. They are the details of what appears in Exhibit 1 and the last exhibit—or let's see, Exhibit 7, is the accounting for the increase in net worth.

Q. From what source or sources did you get the information which is contained in these documents which I have just identified, Mr. Ringo?

A. I first asked Mr. Olender to give me estimated statements of his net worth at various dates. Then I went through his safe deposit box to find out what was in the safe deposit box, and then I tried to trace back how he acquired these various assets he had and through discussion with Mr. Olender and asking questions, so if there were things not included in the safe deposit box that should be included, I tried to get the information from which I could work up these net worth statements. [76]

Q. To what extent, Mr. Ringo, did you verify the information that was given to you by Mr. Olender in your preparing of these documents?

A. Well, I saw the items in his safe deposit box and asked him for means of how he acquired them. I saw canceled checks for various items. I did get

(Testimony of Charles R. Ringo.)

his bank statements which were incomplete, and a period I couldn't get. I got transcripts from the bank, picked out the larger items of expenditures on there to see if they would account for more assets and asked him to get me further information so as to work it out.

Q. For example, on Exhibit 7, certain figures are given for living expenses for years shown. From what source did that information come?

A. Purely from what Mr. Olender told me. There was no way of me knowing just what he spent for living because I don't know just what he did spend for living. They are purely figures that were given to me by Mr. Olender.

Mr. Drewes: At this time, your Honor, the Government will offer the document marked Exhibit 1, Milton Olender Comparative Net Worth as of the Last Day of 1947-48, into evidence.

The Court: It may be marked in evidence.

The Clerk: United States Exhibit No. 24 in evidence.

(Thereupon the document above referred to was received [77] in evidence and marked United States Exhibit No. 24.)

Mr. Drewes: And if your Honor please, as to Exhibits 2 and 3, 3 page 1 and 3 page 2, 4, 5, 6, 7 and 7-A, they are clipped together. We would ask that they be marked for identification.

The Court: So ordered.

The Clerk: United States collective Exhibits No. 25 for identification only.

(Testimony of Charles R. Ringo.)

(Thereupon the documents above referred to were received and marked United States Exhibit No. 25 for identification.)

Q. (By Mr. Drewes): I hand you Government's Exhibit No. 24, Mr. Ringo, and I call your attention to an item included under assets as of December 31, 1947, entitled "Single premium life insurance policy \$15,833.46," and ask you if you had a conversation with the defendant concerning that particular item on Exhibit 24?

A. He brought in the data to me——

Q. Just answer the question. A. Yes.

Q. Where did that conversation take place?

A. In my office.

Q. Do you remember approximately when?

A. Well, it is kind of hard to tell just what date these things took place because these took place all during a period when we were working on this net worth. [78]

Q. During the period when you were making this study? A. That is right.

Q. Was anybody else present at that time?

A. Not on that particular item.

Q. Will you please relate to the ladies and gentlemen of the jury what was said by Mr. Olender and what was said by you, considering that particular item, single premium life insurance policy?

A. Well, let's see, you mean how he brought it in to me?

Q. If you had a conversation concerning that

(Testimony of Charles R. Ringo.)

item, to the best of your recollection will you simply state what was said by Mr. Olender and by you?

A. Mr. Olender brought this data in to me just after I worked up the preliminary net worth and he brought this item to me and told me that he had something that he had forgotten to include.

Q. What did you say?

A. Well, I said at the time it would throw his net worth out of balance.

Q. What did he reply?

A. Well, he did ask me if—because the Asturias stock was worthless, if I would leave that out because he didn't want to involve his mother in connection with certain gifts she had made to him. His mother was getting old and he didn't want her to have to explain. [79]

Q. Do I understand it is your testimony that the defendant asked you to leave the Asturias stock out of the net worth compilation?

A. On the grounds that the stock wasn't worth anything anyway, and he didn't want to have to explain gifts from his mother because he didn't want to involve her, she was getting old.

Q. That request, as I understand your testimony, was made to you after you called the defendant's attention to the fact that the \$15,000 single premium life insurance policy had been left off the net worth statement and therefore it would be out of balance to that extent?

A. That is correct.

Q. What happened then, if anything? Did you

(Testimony of Charles R. Ringo.)

have further discussion with Mr. Olender, or with anyone else in his presence concerning that particular item?

A. Well, I went to Monroe Friedman with it and he insisted it would have to go in, he would have to get the explanation.

Q. I would appreciate if you would elaborate on that. Who was Mr. Friedman?

A. Mr. Friedman was an attorney we brought into the case on the matter.

Q. Representing the defendant?

A. That is correct.

Q. And you discussed this item of the single premium life [80] insurance policy with Mr. Friedman in the presence of Mr. Olender?

A. That is correct.

Q. Will you please, then, to the best of your recollection, state what was said by the persons present?

A. We told him nothing could be left out and we would have to get the gifts from his mother.

Q. Who told the defendant nothing could be left out?

A. Both of us.

Q. You just mentioned the Asturias stock, Mr. Ringo. In the course of your work for the defendant you obtained from him a list of the securities owned by him, did you not, as of several different dates?

A. I believe that was not in his safe deposit box, but we did get that from canceled checks. I asked him to produce canceled checks he told me about at

(Testimony of Charles R. Ringo.)

the time of a check for \$5,000. I have forgotten who the check was made to.

Q. Was the defendant's ownership of Asturias stock included in your net worth statement?

A. That is correct.

Q. As shown in the defendant's Exhibit No. 24?

A. I show on Exhibit 3, page 1, item 12, 500 Asturias Corporation stock.

Q. What is the value of that stock as shown in the net worth statement? [81]

A. \$5,000.

Q. Did the defendant Olender at any time during the course of your work for him tell you that he had purchased an additional \$5,000 worth of Asturias stock?

A. No.

Q. Did he at any time during the period of your study tell you that he had paid \$5,000 to the Asturias Corporation for any purpose?

A. I only have this——

Mr. Hagerty: Object to the question as leading and suggestive.

The Court: It probably is. Sustained.

Q. (By Mr. Drewes): Is the item to which you have just referred \$5,000 as common stock in the Asturias Export Corporation the only investment or contribution mentioned to you by Mr. Olender during the course of your studies?

A. It was the only one on Asturias, yes. The explanation of that will be found on Exhibit 3——

Q. Never mind explanations, Mr. Ringo. Just answer my question.

A. All right.

Q. Mr. Ringo, I will show you a photostatic copy

(Testimony of Charles R. Ringo.)

of a document bearing the title "M. Olender, comparative balance sheets, 1941-1946" and ask you if you can identify that?

A. As I stated, when I first started in, when I first [82] started in with the case I wanted to make up net worth statements, I asked Mr. Olender to bring me estimates of the assets and liabilities he had at the end of each year, and he brought them to me, and from that he gave me a starting point in trying to work up his net worth statement.

Q. I understand, Mr. Ringo. What is that document that is before you?

A. This is a summary of the items he brought to me, the various statements he brought to me of his net worth.

Q. Is that in your handwriting?

A. That is in my handwriting.

Q. Where is the original?

A. Mr. Olender took them back.

Q. Mr. Olender took them back?

A. That is right.

Q. And the information which appears on this document you got from Mr. Olender?

A. That is right.

Mr. Drewes: At this time, your Honor, we will offer this photostatic copy of the identified documents into evidence.

Q. (By Mr. Drewes): The original was returned to the defendant or his representatives?

A. That is right.

The Court: It may be marked. [83]

(Testimony of Charles R. Ringo.)

The Clerk: United States Exhibit No. 26 in evidence.

(Thereupon the photostatic copy of document above referred to was received in evidence and marked United States Exhibit No. 26.)

Mr. Drewes: Ladies and gentlemen of the jury, the information which appears on this photostatic copy is, for the most part, substantially identical with the information which is in the stipulations. However——

Mr. Hagerty: If your Honor please, I will object to this, the document speaks for itself.

The Court: Yes, sustained.

Mr. Drewes: However, I should like to read this part of it to the jury, if I may, because the first item is an item not in the stipulation. It is entitled, "Cash in vault" and although I did not limit it, I will at this time——

Mr. Hagerty: If your Honor please, I will object to the explanation. The exhibit is in evidence and speaks for itself.

Mr. Drewes: Then I won't limit it. The first year is 1941. Shall I read the years '41, '42 and '43 and '44? I was about to limit the years which were pertinent. I was simply stating I was starting with the year 1944, although this document goes down to 1941.

Mr. Hagerty: Oh, I see. I want to cooperate in every respect, but I thought we had something else extraneous. [84]

(Testimony of Charles R. Ringo.)

Mr. Drewes: The first item here is "Cash in vault" and as of the 31st of December, 1944, the figure shown is \$50,000. For the 31st of December, 1945, the figure is \$7200, and for the 31st of December, 1946, nothing.

Q. (By Mr. Drewes): Mr. Ringo, did you prepare the tax returns of Mr. Olender or Mrs. Betty Olender for the years 1945 and 1946 which are in evidence? A. No, I did not.

Q. Did you prepare any tax returns?

A. I prepared them from 1947 on.

Q. '47 on? A. That is right.

Q. Do you recall whether you prepared the taxpayer's 1947 return before or after you began the work for him to which you have testified in connection with these comparative net worth statements?

A. Necessarily the tax returns were due right during the rush season and we postponed any preparation of net worth until the rush season was over.

Q. Your answer is that you prepared the 1947 return before you began undertaking the work which you have testified?

A. That is correct. [85]

Q. In response to an earlier question you testified that you examined the contents of the taxpayer's safe deposit vault? A. That's correct.

Q. Where was that vault, Mr. Ringo, do you recall? A. I have my contents right here.

Q. Where was the safe deposit vault?

A. It was at the Bank of America, 12th and Broadway in Oakland.

(Testimony of Charles R. Ringo.)

Q. In Oakland? A. That's right.

Q. Do you recall approximately when you examined the contents of that vault?

A. On Wednesday, May 5, 1948, about 10 a.m.

Mr. Drewes: No further questions at this time.

Cross-Examination

By Mr. Hagerty:

Q. Mr. Ringo, you prepared this comparative net worth statement for Mr. Olender by questioning him orally about his affairs, is that not true?

A. That is correct.

Q. You made no audit of his affairs, did you?

A. No.

Q. No audit of his books?

A. That's right.

Q. And you did not attempt to fit this comparative net worth [86] or analysis of his accounts and affairs into any particular year, did you?

A. No, that's right. As I say, I started out with that idea, but I didn't finally do it, no.

Q. Now you made an inventory on May 5, 1948—— A. That's right.

Q. ——of the contents of this safe deposit box?

A. That's right.

Q. And you prepared a memorandum right there in the safe deposit vault as you were going through these things, did you not? A. That is right.

Q. And on that memorandum you indicated that there were about \$20,000 in these two and a quar-

(Testimony of Charles R. Ringo.)

ter per cent Treasury Bonds that were being held in the box for Mr. Olender's mother, isn't that true?

Mr. Drewes: If your Honor please, may I object to the improper cross-examination. I don't recall any testimony in chief on the subject of bonds or on the subject of the contents of the box.

Mr. Hagerty: On direct examination it was gone into as to the inventory in the examination of the safe deposit box and its contents.

Mr. Drewes: I asked him what the date was.

The Court: The objection is overruled. You may answer [87] that.

A. I have it right here on the contents of the safe deposit box. "Bonds being held for mother, two and a quarter per cent Treasury Bonds," and listed \$20,000 worth.

Q. (By Mr. Hagerty): And when you were making this inventory of the box were you there alone or were you there with Mr. Olender?

A. I was with Mr. Olender.

Q. You spoke this morning on direct examination about the Goodman transaction. Mr. Olender explained that to you, did he not?

A. He explained—I will say this, I didn't go into any further on the final disposition. I understood he was taking that up with Mr. Friedman as to how he disposed of the bonds——

Q. He explained to you that he——

A. I mean disposed of the stock. I will correct that.

(Testimony of Charles R. Ringo.)

Q. He explained to you, did he not, that he made a purchase of about \$20,000 worth of stock from a man by the name of Goodman; the goods were delivered to him and that they were not proper for his store and that he then was able to dispose of most of them at cost, about 75 per cent of them at cost, in various transactions, and that he made no profit or loss on the deal, and he did not, as a result, put them into the books of the Army & Navy Store? [88]

A. That was explained to me later, that there was no profit on the transaction. He told me that; that is why they were not on the books.

Q. You have been an accountant for many years, Mr. Ringo? A. That's correct.

Q. And in your experience in auditing businesses have you not found that it is a frequent practice of business men that when wash sales occur or large transactions that are not either profitable or in which no loss is sustained, they are not shown in the books of the business because they distort the outlook of the business from an accounting standpoint, is that not true?

A. Of course that would be a matter of the particular firm, how they do it. Of course I think there ought to be some record of it made.

Q. Well, in this instance there was no record on the books but the records of the cashier's checks that you found in the vault, is that not right?

A. No, I got that, I think, from Mr. Root, at the time he brought me the data and I talked it over

(Testimony of Charles R. Ringo.)

with Olender on the cashier's checks. I have a memo somewhere. I am trying to find it, as to how this came up.

Q. Well, in the interests of time, Mr. Ringo, would you say it is fair to state that the Goodman transaction in which neither a profit nor a loss was sustained, the failure to [89] report or show it or record it in the books of the Army & Navy Store in no way tended to make those books less accurate?

Mr. Drewes: I object to that, your Honor. I don't know whether counsel is making a statement or asking a question. It seems it is opinion testimony that he is trying to elicit, or is it a statement as to what the books reflected of this particular firm?

The Court: It may be answered. This man is an expert. He can give us an opinion. You may answer the question.

A. I will say that ordinarily the test of inventories and whether transactions are recorded is not a gross profit test. In other words, the gross profits should be fairly consistent. Now if you had a tremendous transaction of purchases and if they were disposed of at cost, your gross profit would probably be thrown way out because ordinarily gross profits are the difference between what you pay for goods and what you sell them for, and if there was a big disproportion in the amount of purchases, and they were recorded as purchases, and then you had shown them as sales at the same price, your gross profit would be very much distorted. I will say that.

Q. (By Mr. Hagerty): Now the failure to

(Testimony of Charles R. Ringo.)

record or report this Goodman transaction in the books of the Army-Navy Store, that failure was not the reason why you made up a comparative net worth statement, was it?

A. No. I made up a comparative net worth statement because [90] the Government asked for it.

Q. In making up that net worth statement from the information received from Mr. Olender, did he not—that is, at that time he didn't tell you about the Asturias stock, did he?

A. You mean about additional Asturias stock?

Q. Yes.

A. No, he didn't tell me about any additional Asturias stock.

Q. And later, after you discussed it with the agents and they asked you about that item, and then you went back to discuss it with Mr. Olender, did he not tell you that in his mind there was no point of putting in a net worth statement any worthless stock?

A. In fact, at the time he asked me to leave it out he did say the stock is worthless anyway and it wouldn't—shouldn't be in net worth.

Q. He told you he lost all the money he put in it, isn't that correct? A. That is correct.

Q. And that the company was hopelessly insolvent?

A. That's right. But I explained to him at the time that this was not net worth from the standpoint of what is the thing worth but what it costs.

Q. On that point, Mr. Ringo, you have been a

(Testimony of Charles R. Ringo.)

certified public accountant for many years, is that right? [91] A. That's correct.

Q. And you have had broad experience in the field of accounting? A. That's right.

Q. And prior to that you were an agent with the Internal Revenue? A. That's right.

Q. And in addition to that you are an attorney? A. That's correct.

Q. And you are licensed as an attorney to practice before the Tax Court, is that true?

A. That's correct.

Q. And judging from Mr. Olender's comment to you that he didn't think this worthless stock should have been put in the net worth statement, what would you, as an expert accountant, think of his ability as an accountant?

A. Well, now, from the standpoint of the type of net worth statement we were making up here, to account for funds, that would not show any—would not be proper. Of course, if you were showing—your balance sheets anyway do not necessarily reflect values. Balance sheets are historical. And if—unless this had been—there had been some reason to write it off the books, it would reflect in the analysis of the capital account—at least either have to reflect in the analysis of the capital account or it would have to reflect as an asset. [92] In other words, have to be claimed as a loss at the same time on the other. And as this is an interim period, it would either have to show as an asset or it would come out in the Exhibit 7 where I am showing the

(Testimony of Charles R. Ringo.)

analysis of the accounting for his income. So it would not reflect the—a person who would really understand accounting, they would say it really should go in there.

Q. Well Mr. Olender failed to tell you at the same time about a bank account of his wife, isn't that true? A. That is true.

Q. And subsequently in conversation with the agents, Mr. Root and Mr. Whiteside, they asked you in the comparative net worth statement where that account was shown, is that right?

A. They told me that it was not included.

Q. So that you went back to Mr. Olender again and in conversation discussed the matter with him, right? A. That is correct.

Q. And again he told you in his idea of a net worth statement he did not have to include his wife's furs or his wife's personal bank account, is that right? A. That is right.

Q. Again I ask the question, from the standpoint of your experience as an accountant, would you, in your association and experience with Mr. Olender, what do you think of his [93] knowledge of accountancy?

A. Of course, we are getting into something here where it would depend on what kind of a net worth statement you had.

Q. Let me withdraw the question.

A. Of course here we are involved—

Q. Let me withdraw the question, Mr. Ringo, and put it this way. The statement has been made in

(Testimony of Charles R. Ringo.)

this Court, and evidence will be offered apparently that Mr. Olender, the defendant here, is an expert in the field of accountancy. Now you have had close association with him. You are acknowledged an expert. Would you call him an expert?

Mr. Drewes: I will object to that, your Honor, as calling for the opinion and conclusion of the witness on an area in which he is not an expert. His opinion as to another man's ability is not material, relevant evidence.

Mr. Hagerty: If your Honor please, I think that it is. This man is definitely acknowledged as an expert. He is put forward as an expert by the Government. He is the Government's witness and he has had an opportunity through association and dealings and an examination of the defendant to form an opinion as to the defendant's capacity as an accountant, and it is part of the Government's charge here that the Defendant is a good accountant, and I think that this man should be permitted to give his opinion on that subject.

Mr. Drewes: I think he is qualified, your Honor, to [94] testify as to the merits or the shortcomings of the defendant's books.

The Court: As I recall the opening statement made by the Government, he stated that the defendant was at all times conversant with the items concerning his business and so forth. The contention was never made that the defendant had any expert capacity.

Mr. Drewes: I stated in my opening remarks

(Testimony of Charles R. Ringo.)

that he had himself prepared many returns and had control over his own business and had taken a course in accountancy at the University of California.

Mr. Hagerty: His education was brought in as an accountant, that he was a graduate of the University of California and had training in accountancy.

Mr. Drewes: I feel, your Honor, I should state my position just once more, and in a slightly different way. This man is obviously qualified to testify, on the basis of his training and experience, as to such matters as the condition of the defendant's books, whether they reflect the true income of the defendant and otherwise and matters of that kind. But to ask for the opinion of one accountant as to the competency or ability of another——

The Court: I will sustain the objection.

Mr. Drewes: ——is opinion testimony?

The Court: I will sustain the objection. [95]

Q. (By Mr. Hagerty): Well then, Mr. Ringo, in your conversation with the defendant, Mr. Olander, after you took up these two problems with him, that is, as to why he had omitted the item of the Asturias stock and as to why he had omitted the item of his wife's bank account and her furs, didn't he tell you that in his idea as an accountant for whatever net worth statements were supposed to be made it didn't belong there, he didn't think it should go there?

A. He made that remark to me, yes.

Q. Now, Mr. Ringo, you stated before that you

(Testimony of Charles R. Ringo.)

prepared this net worth statement by questioning him as to his assets, didn't you?

A. That is correct.

Q. You questioned him as to his bank accounts?

A. That's right.

Q. And he gave you the names and locations of his accounts, two or three of them, isn't that true?

A. Well, that's right.

Q. And they are in the same bank as his wife's bank account, isn't that true?

A. I don't know where his wife's bank account was. I haven't—

Q. Oh, you didn't find out when you finally discussed it with him?

A. No. Remember this all came up after—this is after [96] I was finished with this net worth statement. So I didn't—

Q. Now on direct examination Mr. Drewes was asking you in reference to this Asturias transaction, where you had it indicated in that net worth statement, and he said: Is that the only item in reference to an Asturias investment that Mr. Olender had told you about? A. Yes.

Q. You answered yes. And then you started to explain that by going to the statement, and Mr. Drewes stopped you. Will you now carry on that explanation?

The Court: We may take a short recess. Same admonition to you, ladies and gentlemen of the Jury.

(Short recess taken.) [97]

(Testimony of Charles R. Ringo.)

Q. Mr. Ringo, just before the recess you were about to answer and make the explanation that Mr. Drewes had stopped you on in reference to the Asturias stock item. Will you proceed, please?

A. On Exhibit 7—no, it is not Exhibit 7—on Exhibit 3, page 2, item 12, it shows personal check to Asturias Import and Export Company December 12, 1946, \$5,000. I want to say that when Mr. Olender presented me with that check that is how I became cognizant of the fact that he had stock in—that he had at least given money to Asturias Import and Export, and on questioning him he told me about this stock.

Q. Did he tell you about any of the quarrels or anything he had had with the management because of the loss of these funds that he had advanced to him?

A. I don't remember him talking about it.

Mr. Drewes: Objected to as improper cross-examination.

The Court: The answer came in. The objection is overruled.

Q. (By Mr. Hagerty): Now actually, Mr. Ringo, you know that Mr. Olender didn't keep his own books, did he?

A. I believe he had a girl keeping the books, and I believe they were not in his handwriting. As I remember, they were not.

Q. And you know of your own examination and your own knowledge that Mr. Olender's parents had

(Testimony of Charles R. Ringo.)

been quite wealthy [98] and he had inherited a lot of money, is that true?

A. That is what Mr. Olender told me.

Mr. Drewes: Your Honor, may I object to this line of questioning. This is improper cross-examination, it is purely matters of defense to be brought into the case at the proper time. There was nothing whatever said about the parents of this man on direct examination.

Mr. Hagerty: It has to do with examinations made by the witness on defendant's affairs.

Mr. Drewes: You will have to call him as your own witness at the proper time.

Mr. Hagerty: It is preliminary to this question I am about to ask.

The Court: All right, I will allow it if it is preliminary.

Q. (By Mr. Hagerty): The books of the Army and Navy store did not reveal any of the personal investments and other affairs of the defendant, is that true? A. That is true.

Q. And as a man experienced in good accountancy you yourself wouldn't expect to find in those books the personal investments of this defendant, would you?

A. Very seldom will you find anybody including their personal investments in their business books.

Q. This comparative net worth study that you prepared was [99] purely intended as a starting point for the work you were going to do for Mr. Olender, isn't that right?

(Testimony of Charles R. Ringo.)

A. Which are you referring to now? You mean the one by years?

Q. The prepared comparative net worth statements that you made up for him.

A. You mean the one that was finally submitted?

Q. Yes.

A. I want to know what you are referring to, whether you mean that other exhibit or this one (indicating).

Q. Let's start with Exhibit No. 26, this one. You have seen the photostatic copy?

A. That is right.

Q. That wasn't intended to be a full and final and complete study, was it?

A. Not by any means, no.

Q. And you, as a matter of fact, didn't audit any of the items that were involved there. You obtained all this information by word of mouth from Mr. Olender?

A. I used that as a starting point.

Q. This was purely a starting point for the other study you prepared, is that true?

A. That is correct.

Q. And if you had tried to break this down into a period of years it would have shown that the defendant had over-reported [100] income as well as under-reported income, isn't that true?

A. That is true.

Mr. Drewes: May I object to that question. Please don't answer. Apparently that question would call for an answer for work that wasn't done.

(Testimony of Charles R. Ringo.)

The Court: That is true, objection sustained.

Mr. Hagerty: No further questions.

Redirect Examination

By Mr. Drewes:

Q. Mr. Ringo, early in the cross-examination Mr. Hagerty asked you a question concerning some bonds which were in there—in Mr. Olender's box?

A. That is correct.

Q. And you testified something about his mother in connection with those bonds, and I didn't quite hear it. What was your testimony on that question?

A. I say here is the list of the bonds of what was in the safe deposit box, and on the second page I have down here bonds being held for mother, and they are two and a quarter per cent treasury bonds, and there is a total of \$20,000 worth.

Q. Would you point out to me the entry?

A. Right there (indicating).

Q. And does that refer to this series above or below? A. The series below.

Q. Oh, I see. And this was the list that you made at the [101] time you inventoried the box?

A. That is right, here is the first page made at the time I inventoried the box.

Q. And that was on May 5th of 1948 you testified? A. That is right.

Q. And from what source did you get that information?

(Testimony of Charles R. Ringo.)

A. We are going back to 1948. Some of this is a little hazy in my memory, but I am pretty sure the bonds were marked that way, there was something in that group of bonds that identified it as mother's bonds.

Q. Was Mr. Olender with you at the time that you made that inventory? A. Oh, yes.

Q. In fact, you so testified?

A. That is right.

Q. Did he tell you that those bonds belonged to his mother?

A. He told me they did, and I believe it was also identified in the box there that they were his mother's.

Mr. Hagerty: I object to this as being cross-examination of his own witness.

The Court: Overruled.

Q. (By Mr. Drewes): Mr. Ringo, you testified on direct examination that you had not prepared the 1945 and 1946 returns for Mr. Olender and his wife, but that you had prepared the returns from 1947 on, is that correct? [102] A. That is correct.

Q. I will show you a yellow paper, it is an accounting paper, containing a number of figures in pen. It is entitled the title at the top, "M. Olender share" and then a word that I don't understand, and the word "expense," and ask you if you can identify that?

A. These are the figures that Mr. Olender gave me in order to prepare his 1947 income tax return.

Q. And is that in his handwriting?

(Testimony of Charles R. Ringo.)

A. That is in his handwriting except you will see where it says "interest" I have inserted in my own handwriting "U. S. Government bonds \$1225."

Q. I show you another document consisting of two pages, plain white paper, it is much the same as the one that you have just identified except that it has been typewritten and it says at the top "Income taxes, depreciation, Olender, Hamilton, Kaplan, Fresno partnership" and a great deal more and ask you if you can identify that?

A. That is the data that Mr. Olender gave me for preparation of his 1948 income tax return.

Q. Did he furnish that to you himself?

A. He furnished it to me.

Mr. Hagerty: If your Honor please, I am going to object to the statements that have been made in reference to these two sheets and ask that the statements be stricken from the [103] record on the grounds that the sheets are incompetent, irrelevant and immaterial because they are outside the scope of this indictment. They refer to the years of 1947 and '48.

Mr. Drewes: May they be marked for identification and then I will make my offer.

The Court: Yes, mark them for identification.

The Clerk: United States Exhibits 27 and 28 for identification only.

(Thereupon the documents above referred to were received and marked United States Exhibits Nos. 27 and 28, respectively, for identification only.)

(Testimony of Charles R. Ringo.)

Mr. Drewes: If your Honor please, these documents will be offered for the purpose of showing that——

Mr. Hagerty: If your Honor please, if it is an offer of proof I would prefer that it be made out of the presence of the jury.

The Court: All right, could you make it shortly before the recess? Could you do that conveniently?

Mr. Drewes: I have a few more questions of this witness and then I will reserve this.

Q. (By Mr. Drewes): Mr. Hagerty asked you a question which I take it was directed to you as an expert accountant, Mr. Ringo. He asked you if it were not common practice for business firms to leave purchases and sales off of their books when the transaction was unprofitable, and it is my [104] recollection that you answered that question by saying that if such a transaction were put on the books it would result in a distortion of the gross profit picture. Was that your testimony, Mr. Ringo?

Mr. Hagerty: I will object to the question as a misstatement of the evidence, misstatement of my question.

Mr. Drewes: That was your question, to the best of my recollection. It was a very long question and was not answered directly by this witness.

Mr. Hagerty: I used the statement of transactions where neither a profit nor loss resulted, a “wash sale” as it is known.

The Court: Let us take your terminology then,

(Testimony of Charles R. Ringo.)

and adopt it for the purposes of the question presented by counsel. What is your answer then?

Mr. Drewes: Very well.

A. I have already said that it probably should be reported on the books some place, but because of the gross profit test if you show them as direct sales and purchases that the gross profit would be distorted, if there was no profit nor loss on the item.

Q. (By Mr. Drewes): I understood that that was your answer? A. That is right.

Q. As an accountant can you state that it is common practice to leave sales and purchases off of books when there has been [105] neither a profit or a loss?

A. No, it is not, common practice. Probably you might show it in order not to distort it—you might show it as a separate transaction, as a “wash transaction” on the books.

Q. And as a certified public accountant would you advise any client to leave it off the books?

A. No.

Q. And did the books of the defendant here show the Goodman transaction in any fashion, by footnote or any other way? A. No way at all.

Mr. Hagerty: Objected to as leading and suggestive, and an attempt to cross-examine his own witness.

The Court: Overruled.

A. No, there weren't. I testified before that they weren't on the books.

(Testimony of Charles R. Ringo.)

Mr. Drewes: Would your Honor indulge me for just a moment?

The Court: Yes.

Q. (By Mr. Drewes): Mr. Ringo, you testified in response to a question, I believe by Mr. Hagerty, that the books of the Army-Navy store were kept by a girl?

A. That was my understanding.

Q. Do you recall her name?

A. No, I don't know the name. I was merely told that by Mr. Olender. I didn't see the girl. [106]

Q. Isn't it true, Mr. Ringo, that the books were kept by the girl under the supervision of Mr. Olender?

A. I don't know, I suppose they were.

Mr. Hagerty: I object to that. It is an attempt to cross-examine this witness, not proper direct examination, leading and suggestive.

The Court: Overruled, you may answer.

The Witness: I don't know positively, but he is the manager of the store. I don't know, probably he would manage the girl. I imagine he would. I don't know that of my own knowledge.

The Court: That answer may go out.

Q. (By Mr. Drewes): Is it true, Mr. Ringo, that Mr. Olender—strike that.

State if you know, Mr. Ringo, that Mr. Olender himself made daily entries of cash in the cash book?

A. I don't remember whether he did or not right now. [107]

Q. Mr. Ringo, I believe you testified on direct examination that Mr. Olender had reported to you

(Testimony of Charles R. Ringo.)

only \$5,000 investment in the Asturias Corporation; is that correct?

A. Which I explained I got from that cancelled check.

Q. But by your answers to the questions asked of you by Mr. Hagerty you don't in any way mean to change that testimony? A. That's correct.

Q. I might return just a moment to the Goodman transaction. Mr. Olender did not enter on his books the purchases of that merchandise from Mr. Goodman, did he?

Mr. Hagerty: Objected to as already having been asked and answered, your Honor.

The Court: Yes, it has.

Q. (By Mr. Drewes): Let me ask, Mr. Ringo, this question, then: As an expert accountant how could a business man, such as Mr. Olender, one engaged—a merchant engaged in buying and selling, tell at the time of a purchase whether or not the resale of the merchandise would be profitable and so determine whether or not to pick up the purchases on his books?

Mr. Hagerty: I will object to that question, your Honor, as calling for speculation of the witness; it is leading and suggestive of his own witness, and the subject in main has already been covered on direct examination and [108] cross-examination.

The Court: Sustained.

Q. (By Mr. Drewes): When did you last receive a fee from the defendant?

(Testimony of Charles R. Ringo.)

A. I couldn't tell you positively because I don't handle that angle of it.

Q. What is it to the best of your recollection or when did you last hear that a fee was received by the Sargent Company from Mr. Olender?

Mr. Hagerty: I will object to that, your Honor, as being incompetent, irrelevant, immaterial and not within the issues of this case.

Mr. Drewes: I believe it bears on the weight of the evidence, your Honor.

The Court: Overruled.

Mr. Hagerty: If your Honor please, I ask then that the question be limited to the period of time under review in this indictment.

The Court: All right. I think that was the import of the question. Do you have the question in mind?

A. I personally don't know because I don't handle that matter.

Mr. Drewes: That is all.

I will make my offer——

The Court: I will hear counsel on this matter of the [109] offer. It is close to the adjournment hour. I recess the jury and adjourn the case until tomorrow morning at 11 o'clock rather than 10 o'clock. 11 o'clock, ladies and gentlemen, tomorrow morning, and the same admonition to you not to discuss the case or to form an opinion until the matter is submitted to you. You may retire.

I will hear this matter from counsel.

(Testimony of Charles R. Ringo.)

(The following proceedings were had out of the presence of the jury:)

Mr. Drewes: Your Honor, will the Clerk instruct the witnesses to return tomorrow morning? There are two that we expect to testify tomorrow.

The Court: All right, 11 o'clock tomorrow.

Mr. Drewes: If your Honor please, the Government's offer in this matter is very simple. On cross-examination——

The Court: Do you direct my attention to documents before you?

Mr. Drewes: Certainly.

The Court: May I see them?

Mr. Drewes: It will take just a minute. Over my objection Mr. Hagerty elicited testimony to the ownership of \$20,000 in bonds.

The Court: Yes.

Mr. Drewes: In the safe deposit vault. Now in 1947 and 1948 this witness prepared returns for the taxpayer. If your [110] Honor will note, the offer is confined entirely to interest reported on the two years and for no other purposes. The difference in the amount of interest reported in 1947 and 1948 is precisely the amount of interest received on the \$20,000.

The Court: This is a breakdown of the interrelations between it?

Mr. Drewes: This is the information upon which the witness prepared the returns for the defendant, and this figure of interest, here, your Honor, we

(Testimony of Charles R. Ringo.)

will show or expect to show this interest, \$1,225, includes the interest on the bonds which the defendant, I take it, asserts is his mother's. He reported the interest as his own. That is the extent of the purpose for which the document is offered.

Mr. Hagerty: It is outside the scope of the time, your Honor, and that interest or that amount of money could have been given to the defendant by his mother. That doesn't show—as a matter of fact, it could have been a change of ownership, a different period of time.

Mr. Drewes: If they were given, your Honor, the vice of that argument is this: if the bonds were given to the defendant, then, of course—as a gift—it would have to be reported.

Mr. Hagerty: Yes, but we don't have under review 1947 and '48. We have only under review 1945 and '46, and the witness [111] has testified that this memorandum indicating ownership in the mother was apparently the result of his observations when making the inventory of the safe deposit box.

The Court: This memorandum was prepared by the taxpayer?

Mr. Drewes: By the taxpayer in his own handwriting and he reported the interest on the bonds which this witness has testified were shown as belonging to the mother.

Mr. Hagerty: But the memorandum, your Honor, showing ownership in the mother was prepared in the handwriting of this witness on the stand now

(Testimony of Charles R. Ringo.)

in the safe deposit vault. Would you show his Honor that memorandum that you have? It is written down. I have a photostatic copy of it.

The Court: The inference to be drawn from this man's testimony thus far is that the bonds were earmarked.

The Witness: Yes, that is correct; they were earmarked bonds.

Mr. Hagerty: Actually they were in an envelope with the word "Mother" on them, which we will prove later by other sources.

The Witness: This is the whole inventory and when you come over here and you get down to the next page here, the bonds are the mother's, which I got from the data on the bonds. Right here \$20,000—

The Court: And yet in the other instance the memo shows the interest reported by the taxpayer on the bonds in question; [112] is that correct?

Mr. Drewes: That is right.

The Witness: It would appear—

The Court: I think it is a question for the jury ultimately as to the ownership, in the light of all the surrounding circumstances. You may examine the witnesses on the matter. I will allow that to go in.

Mr. Hagerty: May we note an exception, your Honor?

The Court: Yes.

Who reported these bonds being held for the mother?

(Testimony of Charles R. Ringo.)

The Witness: I got that from the bonds.

The Court: How were they identified, by a legend or by a piece of paper wrapped around them?

The Witness: I forget. I think they were in an envelope. I think they were in an envelope.

Mr. Hagerty: Your Honor, would you reserve opinion on that? I believe we can show that on the mother's income tax for 1946 that amount was shown as income and that he subsequently gave the income the following year to her son and then he reported it.

The Court: The position here is—will you hand that other memorandum to me, please?

The Witness: I can show you what they mean here. The 1947 list here shows interest, and I have written in my own handwriting, "U. S. Government bonds, \$1225." I come over [113] to '48, U. S. Government bonds, \$775. The difference would be \$450, and two and a quarter on \$20,000 would be \$450.

The Court: And the interest pertains to the bonds in question?

The Witness: That is my understanding.

The Court: I think the memorandum is admissible, subject to explanation of some form.

Mr. Hagerty: Well, then, your Honor, would you order the Government to produce the mother's income tax return for 1946?

The Court: Yes.

Mr. Shelton: We have that, if your Honor please, and we will produce it.

(Testimony of Charles R. Ringo.)

The Court: Certainly there is some explanation, some rationalization. Of course, I can't anticipate what it may be, but here is a credit—

The Witness: That's right.

The Court: I will allow it.

The Clerk: U. S. Exhibits 27 and 28, heretofore marked for identification, now in evidence.

The Court: We will adjourn, gentlemen, unless there is some other matter.

(Thereupon U. S. Exhibits Nos. 27 and 28 for identification were received in evidence.)

Mr. Drewes: No. [114]

The Court: Tomorrow morning at 11 o'clock. And all witnesses are instructed to return.

Mr. Shelton: If your Honor please, may the record show that we have made this clear and available to defense counsel?

The Court: It may be lodged with the Clerk and subject to the examination of all parties.

(Thereupon an adjournment was taken until 11 o'clock a.m. Wednesday, September 17th, 1952.) [115]

September 17, 1952, at 11:00 A.M.

The Clerk: United States of America vs. Olender on trial.

Mr. Menzer: If the Court please, my name is Herbert W. Menzer. I am an attorney for Mr. Morris W. Lerman, subpoenaed to be here at 11:30

this morning. I have here an affidavit from Dr. Ruschin to the effect that Mr. Lerman was injured yesterday in an automobile accident and will be confined in his home for a period of approximately ten days. May I state to the Court that I have talked with the Doctor this morning and he said that they would take X-rays today and that the period involved or stated in this affidavit may be longer or shorter, depending upon what the X-rays show.

The Court: The application will be filed and the United States Attorney may communicate with the Doctor during the course of the trial as to the progress of this gentleman.

Mr. Drewes: We shall keep in touch with him.

CHARLES R. RINGO

called as a witness on behalf of the Government, resumed the stand; previously sworn.

Redirect Examination
(Continued)

By Mr. Drewes:

Q. Mr. Ringo, you have identified Exhibit No. 27 as being data given you by the defendant in his own handwriting pertaining to his 1947 return, and Government's [116] Exhibit No. 28 as being similar data for the year 1948 furnished you by the taxpayer. What is the figure shown for interest in the first exhibit, No. 27?

A. For 1947 the interest shown is \$1225.

(Testimony of Charles R. Ringo.)

Q. And what is a similar figure for the year 1948, Mr. Ringo? A. \$775.

Q. And what is the numerical difference between the two? A. \$450.

Q. State, if you can, what that \$450 represents?

A. It is more surmise than it is fact as far as I know——

Mr. Hagerty: Then, if your Honor please, we will object to it going into the record.

The Court: Well, if it be conjecture or speculation, Mr. Witness, the subject would not be a proper province or your part of the testimony for a jury. If it is based on fact or in the realm of fact you may testify.

Q. (By Mr. Drewes): Do you know, Mr. Ringo, what that difference of \$450 represents?

A. I do not know positively. I think I do.

Q. Is it true, Mr. Ringo, that the sum of \$450 represents one year's interest on two and one-quarter per cent Treasury bonds in the amount of \$20,000?

Mr. Hagerty: Objected to, your Honor, on the grounds that the question has already been asked and answered. He says "I don't know positively," and this is simply another [117] way of leading the man into an admission.

The Court: Do you know?

The Witness: I don't know positively.

The Court: The witness says he doesn't know positively.

Q. (By Mr. Drewes): Did you testify in this

(Testimony of Charles R. Ringo.)

Court last night, Mr. Ringo, it was your understanding that the \$450 represented interest for one year on \$20,000 of bonds paying interest at the rate of 2 and one-quarter per cent?

Mr. Hagerty: Objected to, your Honor, on the ground it is leading and suggestive and an attempt to cross-examine his own witness.

The Court: If he testified last evening I can't recall, but if that be the subject matter of your testimony, was it last evening?

The Witness: I didn't say it just in that way.

The Court: How did you say it?

The Witness: I said that two and a quarter per cent of \$20,000 would be \$450.

Mr. Drewes: If your Honor please, this witness, of course, has been called by the Government, but the record shows that he is employed by the taxpayer as his accountant. I will call the attention of the Court and counsel to the transcript of the proceedings in this court yesterday afternoon out of the presence of the jury. The Court asked the witness to hand him the documents which are in evidence, [118] then the witness at line 23, page 113:

“The Witness: I can show you what they mean here. The 1947 list here shows interest, and I have written in my own handwriting United States Government bonds, \$1225. I come over to 1948, United States Government bonds, \$775. The difference would be \$450, and two and a quarter per cent on \$20,000 would be \$450.

(Testimony of Charles R. Ringo.)

“The Court: And the interest pertains to the bonds in question?”

“The Witness: That is my understanding.”

Q. (By Mr. Drewes): Did you so testify in this court?

A. I said that was my understanding, just what I was trying to say a little while ago.

Q. And now will you state for the jury the basis upon which you arrived at that understanding?

A. Mr. Root was in my office and we compared these amounts and we said that two and a quarter per cent on \$20,000 would be \$450.

Mr. Hagerty: Object to that as being hearsay. It is out of the presence of the defendant.

Q. (By Mr. Drewes): Was the defendant present at that conversation? A. No.

Q. Did you at any time discuss the difference between those two figures with the defendant? [119]

A. I don't remember of ever having discussed it directly with him, no, because that was after the preparation of the statement, of the net worth statements.

Q. When you received from him—

The Court: There was an objection urged by counsel for the defendant, there was no ruling made on it. The Reporter may interpolate my ruling as overruled, the objection imposed by counsel is overruled.

The Witness: Let's see, I forgot what I started to say there. At the time the figures were brought to me—is that what you are asking? Was I just

(Testimony of Charles R. Ringo.)

asked if there were interest—I marked down here interest on U. S. Government bonds. I didn't try to figure out just what bonds they were on.

Q. (By Mr. Drewes): Did you question the defendant after you discussed that difference of \$450 with any person?

A. I have told it to Mr. Lewis, that there was such a difference, but I haven't gotten any answer on it.

Mr. Hagerty: Move the answer be stricken, your Honor, as not responsive.

The Court: It may go out.

Q. (By Mr. Drewes): Did you discuss the difference of \$450 with the taxpayer at any time after you were retained by him as you have heretofore testified?

A. I believe that I have told him that there was a difference and it looks like it was interest [120] on U. S. Government bonds, but I haven't got an answer from him on it.

Mr. Hagerty: I will object to that, your Honor, and move that the last part of it be stricken as speculative, "looks like it might be interest on bonds."

The Court: It may go out.

Q. (By Mr. Drewes): Where, and when, and who was present at the time that you called the defendant's attention to that difference of \$450?

A. Where, when——

Q. And who was present, to the best of your recollection?

(Testimony of Charles R. Ringo.)

A. I believe I discussed it in Mr. Lewis' office some time ago.

Q. Who else was present?

A. As far as I can remember just Mr. Lewis and Mr. Olender.

Q. And to the best of your recollection when you called that difference to the attention of the taxpayer what did he say?

A. They did not give me an answer in that they were holding that in their own files to determine themselves.

Mr. Drewes: I have no further questions.

Mr. Lewis: No questions.

Mr. Hagerty: Might I ask one question, your Honor?

Recross-Examination

By Mr. Hagerty:

Q. Mr. Ringo, when you first were retained by the defendant you went to see him at his [121]; store, isn't that right?

A. That is my—I think the first time I did. He was brought to my office and I think I talked to Mr. Root first. The sequence of events are a little bit hard to remember right now, but I believe I did see him at his store.

Mr. Drewes: Your Honor, the Clerk was talking to me and I missed the question and the response. May I have the Reporter read it?

(Record read by reporter.)

The Witness: I might clarify that a little bit;

(Testimony of Charles R. Ringo.)

it is not too clear on paper. He did first contact our office, then I called Mr. Root in to find out what the case was all about; then I believe, now, that the sequence of events are going to be hard to determine because you don't remember exactly when you saw——

Mr. Drewes: I move the answer be stricken as not responsive.

The Court: Yes, it may go out.

Q. (By Mr. Hagerty): It is your impression, or from what you learned afterwards, you learned that the defendant had gone to see Mr. Sargent?

A. That is correct.

Q. And Mr. Sargent relayed information to you as a result of which you went to see the defendant at his store?

A. That is right, Mr. Sargent turned the case over to me. [122]

Mr. Hagerty: That is all.

(Witness excused.)

HELEN MICHELI

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Helen Micheli, 5534 Broadway; credit clerk at the Gray Shop.

(Testimony of Helen Micheli.)

Direct Examination

By Mr. Drewes:

Q. Miss Micheli, you are employed by the Gray Shop?
A. Yes, sir.

Q. In the course of your employment you have access to the records of the Gray Shop?

A. Yes, I have, sir.

Q. In response to a subpoena served upon you have you brought with you the ledger cards of Mr. Olender and Mrs. Olender?

A. Yes, I have, sir.

Q. For the years 1945 and '46?

A. That is right, sir.

Q. And are those records kept in the regular course of business?
A. That is right. [123]

Q. May I see them, please?

(Thereupon the witness handed the document above referred to to Mr. Drewes.)

Q. (By Mr. Drewes): There is one sheet on both sides?
A. Yes, sir.

Q. And this is a——

A. That is the itemized total.

Mr. Drewes: Limited to the year 1946, your Honor, the Government offers this ledger card and the attached totals as the Government exhibit next in order.

The Court: It may be marked.

The Clerk: United States Exhibit No. 29 in evidence.

(Testimony of Helen Micheli.)

(Whereupon documents identified above were received in evidence and marked U. S. Exhibit No. 29.)

Mr. Drewes: May I state for the record and for the ladies and gentlemen of the jury the exhibit which I have before me shows that in the year 1946 total payments were \$1309.11. I have no further questions.

Cross-Examination

By Mr. Hagerty:

Q. Miss Micheli, I call your attention to the Government's Exhibit No. 29 and to a notation at the top of it in red typewriting. Would you read that? What does that mean?

A. It says "Okay for Daughter Sue to charge."

Q. So this account then was used also by the daughter of [124] the defendant?

A. Well, sir, I really couldn't say. I mean, it could have been.

Q. In other words, you can't tell from the purchases indicated here and the payments indicated whether they were made by the defendant or by his daughter; isn't that true?

A. Well, if they do have the records in the store as yet, we could find out. Now, I don't know, because that has been quite some time ago. We don't keep the sales tags, I don't believe, that long, but they may be there.

Q. In other words, you yourself don't know; is that right?

A. That is right.

(Testimony of Helen Micheli.)

Q. And you can't tell from this record?

A. Not by the record, sir; no.

Q. There are certain payments indicated here which are totaled at the sum of \$1309.11. They are indicated as being cash payments by this ledger sheet.

A. Well, sir, what the—excuse me.

Q. You can't tell from that indication whether or not that was a cash payment or a payment by check, can you?

A. Well, no, because whenever the bookkeeper makes a transaction there it is always posted as check. However, we may have records from way back to where we can indicate whether it is cash or check.

Q. But you can't tell from this record? [125]

A. Not on the ledger; no, sir.

Mr. Hagerty: No further questions.

Mr. Drewes: Thank you; that is all.

(Witness excused.)

JAMES J. DORAN

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

The Witness: James J. Doran, 519 West Hillsdale, San Mateo; credit manager, W. & J. Sloane.

(Testimony of James J. Doran.)

Direct Examination

By Mr. Drewes:

Q. Mr. Doran, as credit manager of W. & J. Sloane you have access to the ledger accounts and records of that concern? A. I do.

Q. In response to a subpoena have you brought with you the ledger account for Milton Olender for the year 1946? A. Yes, I have.

Q. And those records are kept in the regular course of business? A. Yes.

Q. May I see them?

(Thereupon the witness handed Mr. Drewes the document above referred to.) [126]

Mr. Drewes: The Government offers in evidence the identified records.

The Court: Have you examined them, counsel?

Mr. Lewis: Yes, your Honor. We are going to object to the introduction on the grounds that the amounts shown on that account have been stipulated to in the stipulation.

Mr. Drewes: That is so, your Honor. The records are being offered for the purpose on the grounds that they are material and relevant to the standard of living and scale of living of the taxpayer and his family. If they are accepted into evidence I would ask the Court's permission to read to the ladies and gentlemen of the jury certain selected items that appear on the records that are in front of you. [127]

(Testimony of James J. Doran.)

The Court: What does the plenary paragraph of the stipulation say?

Mr. Lewis (Reading):

“Stipulation entered into by and between the parties to this proceeding by their respective counsel.

“The parties are bound to the stipulation for the purposes of this proceeding only and this stipulation does not *include* either party from offering evidence of any character bearing on or related to the wilfulness or lack of wilfulness or any evidence relating to items of assets, liabilities, or expenditures of Milton Olender or Mrs. Betty Olender which are not included in this stipulation.”

The Court: Objection sustained.

Mr. Drewes: That is all.

(Witness excused.)

Mr. Drewes: If your Honor please, the prosecution has relied on the testimony of Mr. Doran this morning. I regret we have no further witnesses to call. And I should advise also the Court that we have but two witnesses called for this afternoon. They have been asked to be here at 2 o'clock and their testimony shall be relatively brief. I regret under the circumstances——

The Court: Then you suggest we resume at 2 o'clock? [128]

Mr. Drewes: Two o'clock.

The Court: Accordingly, ladies and gentlemen, in the light of the statement made by Mr. Drewes,

we will resume the trial at 2 o'clock this afternoon. The same admonition to you not to discuss the case under any conditions, nor to form an opinion until the matter is submitted to you.

(Thereupon a recess was taken until 2 o'clock p.m. this date.) [129]

September 17, 1952, at 2:00 P.M.

MEDBURY BLANCHARD

was called as a witness on behalf of the Government; sworn.

The Clerk: Please give your name, your address and your occupation to the Court and to the jury.

A. My full name is Medbury Blanchard; I live at 762 Cedar Street in San Carlos.

Q. Occupation?

A. I am—well, I am a public accountant. I am substantially retired at the present time.

Direct Examination

By Mr. Drewes:

Q. Mr. Blanchard, by whom were you employed in the year 1947?

A. I was employed at that time by the Treasury Department as special agent.

Q. And where, Mr. Blanchard?

A. Here in the City of San Francisco.

Q. Do you know the defendant, Mr. Olender?

A. I have met him.

(Testimony of Medbury Blanchard.)

Q. Do you see him in the courtroom?

A. I do.

Q. During the year 1947, Mr. Blanchard, did you have any conversation with Mr. Olender?

A. Yes, I had several conversations with [130] him.

Q. And where did those conversations take place?

A. Two of them that I recall took place at his place of business in Oakland, and two of them or maybe three there, I am not positive—I think two or three at his office in Oakland, and the other two in the Federal Building here in San Francisco.

Q. Do you recall the approximate dates of those conversations or the period of time covered by them, roughly?

A. I couldn't give you the dates of them, sir, except by reference to other matters which would refresh my recollection in all probability. I haven't done so independently. And I would say that those conversations took place over a period of a few weeks, couple of weeks, maybe, a lapse of time in between.

Q. Were other persons present during the course of these conversations?

A. Well, the first conversations, two or three which took place in Mr. Olender's place of business, I believe on one occasion his son was in the room or in the building, in the store there. The other two, as I recall, were with him entirely alone.

Q. During the course of any of those conversa-

(Testimony of Medbury Blanchard.)

tions which you have described, Mr. Blanchard, did the defendant tell you anything concerning his educational background?

A. Yes. He in the course of conversation he stated to me [131] that he had attended the University of California and that he had studied accounting there. I think he said he majored in accounting, if I am not mistaken.

Q. And during the course of any of those conversations with Mr. Olender was anything said by you or by him concerning the preparation by Mr. Olender of tax returns for other persons?

A. He said that he had on occasions prepared tax returns for members of his family and friends.

Q. Did he at any time show you any retained copies of income tax returns?

A. He showed me one, yes. I recall very distinctly showing me a return which he took from a drawer.

Q. He took from a drawer? A. Yes.

Q. Were there any other returns in that drawer?

A. There were papers that looked like them, but I did not examine them, so I could not say they were returns at all. I only know that they looked like it from the point that I saw of them.

Q. Mr. Blanchard, will you state the purpose of your conversations with Mr. Olender?

A. Well, I had been assigned the investigation known as the George Goodman Sales Agency. The case, I believe, originated in New York, and our office was requested to make an investigation [132]

(Testimony of Medbury Blanchard.)

of the amount of the business that had been done there in this Treasury District, 14th Treasury District, by the George Goodman Sales Agency, and I was assigned to make that investigation.

Q. Was it in the course of that investigation that you had the discussions which you have testified with Mr. Olender? A. Correct.

Mr. Drewes: I have no further questions.

Mr. Lewis: No questions.

The Court: Is it agreeable to counsel that the witness be excused?

Mr. Drewes: Yes.

Mr. Lewis: Yes.

(Witness excused.)

TRUMAN H. HARLEY, JR.

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Truman H. Harley, Jr.

Q. Your address?

A. Route 1, Box 34-B, Glen Ellen.

Q. Your occupation?

A. Guest ranch operator. [133]

Direct Examination

By Mr. Drewes:

Q. Mr. Harley, by whom were you employed in 1946? A. Bank of America.

(Testimony of Truman H. Harley, Jr.)

Q. Where, Mr. Harley?

A. At the Oakland Main Office.

Q. And what was your position with the bank at that time?

A. Personnel and operations officer.

Q. Mr. Harley, I show you three documents which are entitled "Form TCR-1 Report of currency transactions." One is dated January 10, 1946; one March 26, 1946, and one September 20, 1946, and I ask you if your signature appears thereon? A. It does.

Q. What are those documents, Mr. Harley?

Mr. Hagerty: Just a moment. I didn't quite catch that question. May I have it read, your Honor?

(Question read by Reporter.)

Mr. Hagerty: I will object to that question because the documents speak for themselves.

The Court: In a general way, what are they?—describe them.

The Witness: Merely a report on large sums of cash which were given to the tellers in the bank either for deposit or for the issuance of cashier's checks or other purposes.

Q. (By Mr. Drewes): Was it one of your duties to prepare [134] or supervise the preparation of those documents? A. It was.

Q. And those documents are required to be prepared by the bank?

A. Well, it was the—it wasn't mandatory, I

(Testimony of Truman H. Harley, Jr.)

suppose. It was a suggestion of the Treasury Department that the banks conform—to cooperate with the Government in preparing them, these reports on large transactions, and as far as I know, it was the policy of the Bank of America to see that they were prepared. It was our instructions from head office to see that they were prepared.

Q. The particular reports that you have before you, as to those, Mr. Harley, were they prepared by you or under your supervision?

A. Yes, they were.

Mr. Drewes: May I have them, please? At this time, your Honor, the Government offers into evidence three reports which have been identified by the witness, entitled "Form TCR-1," for the three dates heretofore mentioned.

The Court: Let me see them.

Mr. Drewes: As separate exhibits.

The Court: No objection? You have examined those?

Mr. Lewis: Yes, we have. No objection.

The Court: They may be marked.

The Clerk: U. S. Exhibits 30, 31 and 32 in [135] evidence.

(Thereupon the documents previously identified were received in evidence and marked, respectively, U. S. Exhibits Nos. 30, 31 and 32.)

Q. (By Mr. Drewes): Mr. Harley, I show you another such form, which is dated June 18, 1946, and ask you if you recognize the signature on that

(Testimony of Truman H. Harley, Jr.)

form? A. I believe it is Wayne Tibbetts.

Q. And who was——

Mr. Hagerty: If your Honor please—just a moment. If he is uncertain, I move to strike the speculative statement he has made.

Mr. Drewes: May I ask a few more questions of the witness, subject to the objection?

The Court: Yes.

Q. (By Mr. Drewes): And who was Mr. Tibbetts?

A. He was an officer of the main office.

Q. And was he employed by the Bank of America at the same time that you were employed?

A. Yes, sir.

Q. By the Bank of America? A. Yes, sir.

Q. Can you state positively that that is the signature of Mr. Tibbetts?

A. Yes, sir. I might add this, that the forms were so numerous that they were signed by many officers at the Oakland [136] Main Office. They weren't all entirely signed by me.

Q. That is understood, Mr. Harley. But are you familiar with Mr. Tibbett's signature?

A. Very definitely.

Q. Can you state that this was his?

A. Positively, it is his.

Q. It is his signature? A. Yes.

Mr. Drewes: This will be offered, your Honor, as the next exhibit.

Q. (By Mr. Drewes): Now, Mr. Harley, do you know the defendant, Mr. Olender?

(Testimony of Truman H. Harley, Jr.)

A. Well, no.

Q. What I meant—strike the question.

Do you recognize the defendant Olender?

A. I believe I see him in this room, if you put it that way, yes. I have talked to him, I believe, several times at the Oakland main office. I believe I see Mr. Olender in this room.

Q. And where is he sitting?

A. I believe he is the third man at the end of the table over there.

Q. You say you have talked to him at the bank on several occasions?

A. On several occasions.

Q. And when did those several conversations take place, to [137] the best of your recollection?

The Clerk: U. S. Exhibit No. 33 in evidence.

The Court: So ordered.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 33.)

A. Well, that would be difficult to say. I suppose the last few years I was at the Oakland main office. He operated his store like other merchants, and they had currency and coin needs and little things like returned checks and things like that that would come up for discussion.

Q. Mr. Harley, did you ever have a discussion with Mr. Olender concerning the Treasury forms which you have just identified?

A. Yes, I did.

(Testimony of Truman H. Harley, Jr.)

Q. Was anyone else present at the time of that conversation?

A. No, I don't believe so. I think he came back to my desk.

Q. Will you state what was said by Mr. Olender and what was said by yourself to the best of your recollection concerning these Treasury forms that have just been admitted into evidence?

A. Well, as I recall it, it seemed that some member of the Government had asked him about these reports submitted from the Bank over there and he seemed surprised and, I suppose, indignant or annoyed about it, that we should have reported it. As I say, all I have to say is that it's the [138] regulations of the Government that regulate banks and we have to make certain reports.

As I say, I know that he told me that somebody was investigating this currency and he says, well, that money was used to buy bonds or cashier's checks, as the forms would show, and I said, well, if that was it, the forms will show, and, that is, the other records will show that the cashier's checks were purchased. It is just a matter of form, as far as we were concerned, in conforming to the letter of the law applicable to Federal banks.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Hagerty:

Q. Mr. Harley, you said that there were many of these forms prepared by the bank and several

(Testimony of Truman H. Harley, Jr.)

officers had signed them, they were so voluminous; is that right? A. That's correct.

Q. Mr. Olender was a depositor of the bank; is that correct? A. Yes, sir.

Q. And well known in the bank; is that correct?

A. As far as I know, yes.

Q. And his reputation in the community for truth, honesty and integrity, as far as you know, was very good?

Mr. Drewes: I will object to that as improper cross-examination.

The Court: Sustained. [139]

The Witness: In fact, I don't know anything about him other than these few brief discussions I had. The man—I don't know of anything to the contrary, that's for sure.

Mr. Hagerty: Thank you, Mr. Harley.

Mr. Drewes: May that be stricken from the record?

The Court: That may go out.

Mr. Hagerty: That he doesn't know anything about him.

The Court: The witness is excused?

Mr. Drewes: No further questions.

Mr. Hagerty: No further questions.

(Witness excused.)

Mr. Drewes: With the Court's permission, I should like to read for the record and the benefit of the jury the brief entries that appear on these records which have just been introduced.

Each of these forms bears the heading of the reporting bank, which is, as you just heard, in each case, the Bank of America, main office in Oakland, and bears the name of the person or organization which is concerned in the transaction, and then in each case——

Well, in the first case it is the Army and Navy Store located 1026 Broadway in Oakland, and then part C is the transaction reported, and on Government Exhibit No. 30, which is the form dated March 26, 1946, the following appears: The date, December 5, 1945, and \$10,000, and \$15,000. [140] Then there is a column for the explanation.

Would you ask the witness to be seated, Mr. Clerk?

The Clerk: Shall I swear the witness?

Mr. Drewes: Swear the witness.

LENUS CARDOZA

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Lenus Cardoza, 60 Halkin Lane, Berkeley 7.

Q. Occupation?

A. Assistant auditor, American Trust Company.

Mr. Drewes: To go back, the date in this first item is the 5th of December, 1945, and it shows the amount of \$10,000 and also the amount of \$15,000. Under that and under the explanation, nature of

(Testimony of Lenus Cardoza.)

the transaction column, it says—it reads as follows:

“Issued cashier’s checks for amounts paid with entire cash. Purpose: To buy bonds.”

Then there is another entry on this particular form, November, 1945, and the amount \$25,000. “The nature of the transaction: Issued cashier’s check. Paid cash for purchase of bonds.”

Exhibit 31, the person is indicated, person concerned in the transaction is indicated as M. Olender at 1026 Broadway, Oakland. The transaction is reported—two transactions, [141] the first November 9, 1945, in the amount of \$25,000, and then the form indicates that there were 250 one hundred dollar bills. Similarly on the 20th of November, 1945, the total amount is shown \$25,000, and likewise the transaction is described as 250 one hundred dollar bills. And then as to the statement of the transaction, as follows:

“9 November, 1945,” which is the first of the \$25,000 transactions, “cashed check of \$25,000.” Second, referring to November 20th transaction, “Deposited \$25,000 to commercial account.”

So, in other words, the first of these two transactions the bank cashed a check for \$25,000, paying the defendant 250 one hundred dollar bills, and the second transaction the defendant deposited 250 one hundred dollar bills on the dates shown.

Exhibit 32, the person involved in the transaction is Milton H. Olender, 1026 Broadway. This transaction is shown as of September 19, 1946. There are two entries. \$1,000 in one hundred dollar bills

(Testimony of Lenus Cardoza.)

and \$1500 in \$20 bills, as shown as having been deposited by the defendant.

Exhibit No. 33, the person concerned in the transaction is reported as M. H. Olender, 1026 Broadway, Oakland, California. The date of the transaction—there is but one—is May 29, 1946, and the transaction shown is the purchase of a cashier's check in the amount of \$3,000 for which the [142] defendant paid three one thousand dollar bills.

Direct Examination

By Mr. Drewes:

Q. What is your name, sir?

A. Lenus Cardoza.

Q. And you are employed by the American Trust Company? A. I am.

Q. And in response to a subpoena which has been served upon you, do you have with you two cashier's checks? A. I do.

Q. And do you also have two applications therefor?

A. I do not have the applications. I have the registers covering these checks.

Mr. Drewes: May I see them, please?

(Witness producing documents.)

Mr. Drewes: Would your Honor bear with me for just a moment?

It is stipulated, your Honor, that the two cashier's checks, numbers 7115 and 7146, drawn upon the American Trust Company, and the two register

(Testimony of Lenus Cardoza.)

sheets, which I am holding in my hand, dated May 14th, May 15th, may go into evidence.

The Court: Yes.

Q. (By Mr. Drewes): Do you have photostatic copies with you? A. I do.

Mr. Drewes: Does counsel have any objection to the photostatic copies being substituted for the originals? [143]

Mr. Lewis: That is all right.

The Court: They may be marked in evidence.

The Clerk: U. S. Exhibits 34, 35, 36 and 37 in evidence.

(Thereupon the registers and checks identified above were received in evidence and marked U. S. Exhibits Nos. 34, 35, 36 and 37.)

Mr. Drewes: I will return the originals to you, Mr. Cardoza.

Q. I might ask you, Mr. Cardoza, do you have personal knowledge of the endorsements that appear on those checks? As an officer of the bank do you know or can you identify those endorsements? I am not asking you just to read them.

A. I don't quite understand your question.

Q. Do you recognize the signatures?

A. I do not.

Mr. Drewes: Thank you. I have no further questions.

Mr. Hagerty: No questions.

(Witness excused.)

Mr. Drewes: I very much regret, your Honor, that we have no further evidence to put on today. We hadn't expected the change in plans.

The Court: Accordingly, we may adjourn until tomorrow morning at 10 o'clock. With the same admonition to the jury not to discuss the case under any conditions or circumstances, not to form an opinion until the matter is submitted. [144]

You will have your witnesses in readiness tomorrow, then?

Mr. Drewes: Yes, your Honor.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m. Thursday, September 18, 1952.) [144-A]

September 18, 1952, at 10:00 A.M.

The Clerk: United States of America vs. Olander on trial.

LEWIS LEAVY

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Lewis Leavy, 304 Euclid; dealer in military supplies.

Direct Examination

By Mr. Drewes:

Q. Where is your place of business?

A. 1026 Mission Street, San Francisco.

(Testimony of Lewis Leavy.)

Q. Do you know Milton Olender?

A. I do.

Q. Have you had business dealings with Mr. Olender? A. I have.

Q. Over what period of time?

A. About ten years.

Q. Do you still have business transactions with Mr. Olender? A. Yes, sir.

Q. Mr. Leavy, in May of 1945 did you sell 200 sailor suits to one Lerman?

A. I sold him 200, but I don't remember the exact date.

Q. Mr. Leavy, I hand you two statements, numbers 2512 and 2513, and ask you to examine them and tell me if they refresh [145] your recollection as to when those transactions took place?

A. That is correct.

Q. What were the dates?

A. I didn't get that.

Q. What were the dates then?

A. 5-14-45, one was 5-12 and one was 5-14.

Q. Did you give those statements to Mr. Lerman? A. I believe I did.

Q. And these two statements show the delivery to Mr. Lerman of one hundred sailor suits as to each statement, or a total of 200 for the two days in question? A. Right.

Q. For whom were you acting in connection with that sale? A. For Mr. Olender.

Q. And was he the owner of the suits which were the subject of those two sales to Mr. Lerman?

(Testimony of Lewis Leavy.)

A. Yes, sir.

Mr. Drewes: I shall offer these two invoices as Government's next in order, your Honor.

Mr. Lewis: No objection, your Honor.

The Court: They may be marked in evidence.

The Clerk: United States Exhibits 38 and 39 in evidence.

(Thereupon the invoices above referred to were received in evidence and marked United States Exhibits Nos. 38 and 39, [146] respectively.)

Q. (By Mr. Drewes): Mr. Leavy, I will now show you two cashier's checks drawn on the American Trust Company, each in the amount of \$2500, which have heretofore been admitted in evidence in this trial and are marked as United States Exhibits No. 34 and No. 35. I will ask you to examine them and to examine the endorsements on the back of each and tell me if those were the checks which were tendered to you by Mr. Lerman in payment for the two sales to which you have just testified. You will note the dates and the amounts, the endorsements.

A. Yes, sir.

Q. What did you do with those two checks, Mr. Leavy?

A. Turned them over to Mr. Olender.

Q. After having endorsed them, your endorsement appears on the back of each check?

A. That is right.

Q. Mr. Leavy, in the closing months of 1945 and

(Testimony of Lewis Leavy.)

early 1946 did you have occasion to make other sales of sailor suits for Mr. Olender? A. Yes.

Q. What were those?

A. I sold between 250 or 300 or 320, I don't remember exactly; in about that amount.

Q. In the closing months of 1945, Mr. Leavy, did you have occasion to travel to New York on behalf of Mr. Olender [147] for the purpose of purchasing sailor suits?

A. Not on behalf; I went there on my own business.

Q. In connection with that trip did you attempt to purchase sailor suits for Mr. Olender?

A. I did.

Q. And did you take with you funds belonging to Mr. Olender for that purpose? A. I did.

Q. And to the best of your recollection how much did you have with you?

A. Oh, anywhere between six and seven thousand dollars. I don't know exactly how much it was.

Q. Somewhere in the neighborhood of six and seven thousand dollars? A. Yes.

Q. Could it have exceeded seven thousand dollars?

A. I would remember that; I don't believe so.

Q. Not by a great amount, in any event?

A. No.

Q. Do you recall the form in which you took those funds? A. No, I do not.

Q. You do not recall whether it was in the form of cash, checks, or otherwise?

(Testimony of Lewis Leavy.)

A. I wouldn't remember that.

Q. What was the source of the six or seven thousand dollars [148] that you took with you, Mr. Leavy?

A. I don't get that.

Q. You testified, Mr. Leavy, that you had made other sales of sailor suits for Mr. Olender?

A. That is right.

Q. Did the six or seven thousand dollars which you took with you come from those sales which you have testified?

A. That is right.

Q. And you took that money with you to New York at the instructions of Mr. Olender?

A. That is right, to buy small sizes of sailor suits.

Q. To buy small sizes of sailor suits?

A. Yes, sir.

Q. It was his money?

A. It was his money.

Q. It had come into your possession as a result of sales of his suits which you had made for him; is that correct?

A. That is correct.

Q. Mr. Leavy, have you brought with you your ledger sheets for the year 1942?

A. No, you asked me for '44 to '46 or '47—no, '42. I have got them all here, yes.

Q. We asked you for '45 and '46; it was my impression that you had brought them all.

A. It is all of them. [149]

Q. For what period of time do they cover?

A. From 1942 until '47.

Q. Do any of the transactions in which you en-

(Testimony of Lewis Leavy.)

gaged on behalf of Mr. Olender to which you have testified appear in your books?

A. You are talking regarding sailor suits?

Q. That is correct, the sailor suits, the transactions to which you have testified?

A. No, sir, for the reason that I was not in that business. I just acted as an agent and buying those sailor suits for Mr. Olender, I just done it as a favor for him because they were very difficult to get at the time.

Q. Just one or two further questions, Mr. Leavy. Refer again to the six or seven thousand dollars that you took to New York with you. To whom, if anyone, did you turn over that money?

A. M. Saraga.

Q. And who was he?

A. He was in the business of handling military supplies, and he had some sailor suits at the time or was having them made.

Q. And you turned the money over to him for the purpose of purchasing from him sailor suits?

A. That is right, for Mr. Olender.

Mr. Drewes: No further questions. [150]

Cross-Examination

By Mr. Hagerty:

Q. Mr. Leavy, you are acquainted with the defendant, Mr. Olender? A. I am.

Q. How long have you known him?

A. Since about '42.

(Testimony of Lewis Leavy.)

Q. And you know him through business that he has done with you? A. That is all.

Q. Why were you going to make these purchases on his behalf in New York?

A. On sailor suits?

Q. Yes.

A. Because he was a very good account of mine and I tried to help him. They were very difficult to obtain.

Q. Would you tell his Honor and the ladies and gentlemen of the jury the general conversation you had with Mr. Olender when you started out to get these for him?

Mr. Drewes: Objected to as no proper foundation being laid, apparently calls for a recital. I suggest that counsel ask specific questions so that objections may be posed if they are advisable.

The Court: I will allow that. Overruled.

A. About 1943 Mr. Olender asked me time and time again whether I could obtain some sailor suits for him. [151]

Mr. Drewes: Object to that as hearsay testimony, your Honor, and move that it be stricken.

The Court: Overruled.

The Witness: And I said, "the next time I go to New York I will try and obtain some for you." So when I went to New York, I believe it was in 1944, I made some arrangements with a concern, George Goodman, by which I purchased about \$20,000 worth of sailor suits for him.

Q. (By Mr. Hagerty): These suits were subse-

(Testimony of Lewis Leavy.)

quently delivered to Mr. Olender in Oakland, is that true? A. That is right.

Q. Were these suits merchandisable suits for Mr. Olender? In other words, were they the proper sizes or the proper qualities that they had been represented to be?

Mr. Drewes: Objected to, your Honor, as improper cross-examination.

The Court: What materiality would that have?

Mr. Hagerty: Well, this is preliminary, your Honor, to lead up to this sale to Mr. Lerman that the U. S. Attorney has just brought in, to explain why the sale was made of these goods of Mr. Olender's to Mr. Lerman who is a nearby competitor of Mr. Olender's.

The Court: In that case the objection is overruled.

A. When Mr. Olender got these suits several weeks later he complained to me that the sizes were not what he bought. [152] The sizes that were on the suits as 34 was practically a 38. The size that was a 38 was a 42 and he said I have got to try and get rid of some of those suits for him because he cannot sell large sizes for the reason that he had no tailor to cut down the sizes. I told him that I would try and dispose of some of the suits to some of my customers for him.

Q. Then subsequently did you dispose of some of them to Mr. Lerman?

A. I did, 200 to Mr. Lerman.

(Testimony of Lewis Leavy.)

Q. Mr. Lerman operates a store in the near vicinity of Mr. Olender?

A. Right opposite Mr. Olender.

Q. How is it that you could dispose of these suits to Mr. Lerman, a competitor of Mr. Olender's in the same city?

A. He had a tailor who could cut down suits.

Q. In the course of that transaction did you ever tell Mr. Lerman the source of these suits?

A. No, sir, never told him who they came from.

Q. Why didn't you?

A. Because I don't believe that Mr. Lerman would have bought them, and I don't believe Mr. Olender would have sold them to Mr. Lerman on account of competitors.

Q. Mr. Leavy, do you know Mr. Whiteside or Mr. Root sitting at this table?

A. I believe I do, yes. [153]

Q. Have you been questioned by both those men at your place in reference to these transactions?

A. I believe I have, yes.

Q. Did they take a statement from you there?

A. I believe they have.

Q. And in that statement did you fully outline what your testimony has been here today?

A. Part of it, yes.

Mr. Hagerty: No further questions.

Redirect Examination

By Mr. Drewes:

Q. It is your testimony, Mr. Leavy, that you

(Testimony of Lewis Leavy.)

undertook to sell Mr. Olender's sailor suits to Mr. Lerman because they were all large sizes?

A. Well, he complained that they were large sizes. I never examined the suits. He just told me they were large sizes and he couldn't use them.

Q. And asked you to sell them for him?

A. That is right.

Q. And then you did sell them as you have testified to Mr. Lerman? A. I did.

Q. You have testified, Mr. Leavy, that the Government's Exhibits No. 38 and No. 39 were prepared in your office? A. Yes.

Q. You have identified them. Would you please read to the [154] ladies and gentlemen of the jury the sizes and numbers of each suit covered?

A. Ten 35's, twenty 36's, twenty-five 37's, twenty-five 38's, ten 39's, ten 40's. Fifteen 35's fifteen 36's, twenty-five 37's, twenty-five 38's, ten 39's, and ten 40's, but Mr.—

Mr. Drewes: That is all, Mr. Witness. I have no further questions.

Recross-Examination

By Mr. Hagerty:

Q. Mr. Leavy, now in reference to these enumerations of sizes on the invoice did you find or learn subsequently that those sizes indicated on the invoices did not actually correspond with the goods?

A. That is what Mr. Olender told me, that the tickets on the suits were not as marked, but I never examined them.

(Testimony of Lewis Leavy.)

Q. Now, when he had originally asked you to help him get these suits did he specify that he wanted small sizes? A. That is right.

Q. Did he tell you that he had no market for the larger size suits? A. He did.

Mr. Hagerty: No further questions.

Mr. Drewes: That is all, Mr. Witness. Would you be kind enough to wait in the witness room? We may wish to call you again. [155]

MOE SARAGA

was called as a witness on behalf of the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Moe Saraga, 656 Broadway, New York City, merchant.

Direct Examination

By Mr. Drewes:

Q. Mr. Saraga, there has been testimony this morning in this trial to the effect that late in 1945, a Mr. Leavy travelled from San Francisco to New York, and while there he gave you a sum of money, between six and seven thousand dollars for the purpose of buying from you sailor suits on behalf of Mr. Olender. Do you recall that transaction?

A. I do.

Q. Have you brought with you your books of account in response to a subpoena served upon you?

A. I did.

(Testimony of Moe Saraga.)

Q. Does that transaction appear in your books?

A. I believe it does.

Q. Will you please find it for me? Have you located it?

A. I have, sir.

Q. Will you point it out to me, Mr. Saraga? There are total receipts by you from Mr. Leavy—how many receipts were there, Mr. Saraga?

A. Five. [156]

Q. And as of what date?

A. As of July, 1945.

Q. July of 1945. Well, Mr. Saraga, those apparently are not the transactions to which Mr. Leavy has heretofore testified. He testified that late in 1945 he tendered the sum of six or seven thousand dollars to you for the purposes heretofore mentioned.

A. We have an entry here, August 1st, \$7,000, and one entry here of \$3300.

Q. What were the dates of those two entries?

A. August 1st, and there is one here for \$6500.

Q. May I have that again?

A. Another one in August of \$6500.

Q. In August of 1945? A. Right.

Mr. Lewis: Your Honor, I object to the witness testifying as to his books until they are properly identified and put into the record.

Mr. Drewes: Well, your Honor, I have asked the witness to find the entry in the books. I am unable to do so.

The Court: Counsel, have you had an opportunity to examine these books?

(Testimony of Moe Saraga.)

Mr. Lewis: No, I haven't examined those books.

The Court: I suggest that counsel examine the page in question and then we can have some clarification. [157]

The Court: Are those the only transactions referred to in the year 1945?

The Witness: Yes, your Honor.

The Court: The only transactions you had with Mr. Leavy?

The Witness: Yes.

The Court: You might examine them, Mr. Lewis.

Mr. Drewes: I might say that we have not had an opportunity to examine the books either, except very briefly, ten minutes this morning. It might be wise if we took a very short recess, your Honor, in which we would have a chance to examine them.

The Court: All right. How long will it take you, ten minutes or so?

Mr. Drewes: I should think so. It depends on what we find.

The Court: We will take a very short recess, ladies and gentlemen, in order to permit counsel on both sides to examine these books of account in the light of the disclosure made, and the same admonition to you not to discuss the case or form an opinion.

(Short recess.) [158]

Q. (By Mr. Drewes): Mr. Saraga, what is the name of your business? A. M. Saraga.

Q. Is that a corporation, partnership?

A. At present it is a corporation.

(Testimony of Moe Saraga.)

Q. It is a corporation and you are the president?
A. That's right.

Q. Do you have the books before you from which you testified earlier?
A. Right, I have.

Q. Those are the books and records of your corporation?

A. Those are the books and records of the company.

Q. Of the company?
A. M. Saraga.

Q. Do I understand that there is more than one organization?

A. These books here are from M. Saraga, not the corporation books.

Q. Not the corporation books?
A. No.

Q. What is M. Saraga, a proprietorship or partnership?

A. That was just a single owner.

Q. Do I understand that you have incorporated since?
A. Since.

Q. Since the date——
A. Since '45. [159]

Q. ——since the date of those records, the dates those records bear?
A. Yes, sir. Yes, sir.

Q. I see. Were the books and records which you have before you kept by you or under your supervision, Mr. Saraga?
A. Yes.

Q. Were they kept in the regular course of business?
A. Yes.

Mr. Drewes: The Government will ask they be introduced in evidence.

The cash receipts and cash disbursements books are the only ones in which we are interested.

(Testimony of Moe Saraga.)

The Court: Pardon me, counsel. You wish to make an offer now of the books?

Mr. Drewes: I withdraw the offer for a moment. Yes.

Q. I want the cash receipts and cash disbursements books only, Mr. Saraga. May I have those two for the years '45 and '46. Do they consist of these two volumes? What's this? Are all three of them cash receipts—

A. There is one more book here. Is there another book here?

The Court: May the record show, counsel, that you have had an opportunity to examine these books?

Mr. Hagerty: Yes.

Mr. Lewis: Yes.

The Court: You are satisfied with the examination? [160]

Mr. Hagerty: Yes.

Mr. Lewis: Yes.

Mr. Drewes: I believe, your Honor, that all three—

The Court: In the future it will save considerable time—may I interrupt you temporarily—in connection with books of account and the like, if you have a fair exchange between counsel in advance.

All right.

Mr. Drewes: They will be offered at this time. I believe the three volumes can be marked as one exhibit.

(Testimony of Moe Saraga.)

The Court: Are there specific pages you are going to refer to?

Mr. Drewes: I am going to refer to specific pages. There are only three or four of them.

The Court: I suggest, so that the gentlemen may have his books of account, that you have or cause to be photostated the pages to which reference may be made. The Clerk of the Court will undertake to do that, have the Government photostat them, and have a copy made for defense counsel, and have a copy made for yourself, one for filing, and return the books to this gentleman.

Mr. Drewes: Very well. That shall be done.

The Court: Just the pages in question.

Mr. Drewes: There are very few pages involved.

The Court: Then the books may be returned to you (indicating witness). [161]

The Clerk: U. S. Exhibits 40, 40-A and 40-B in evidence.

(Thereupon three volumes, M. Saraga cash receipts and cash disbursements books, were received in evidence and marked United States Exhibits 40, 40-A and 40-B in evidence.)

The Court: The witness just said he hasn't any particular use for the books in question. So they may remain here and then be delivered to you.

The Witness: That's right.

The Court: All right. That simplifies it.

Q. (By Mr. Drewes): I will now return these books to you, Mr. Saraga. They have been introduced in evidence.

(Testimony of Moe Saraga.)

Mr. Saraga, will you—

May I state, your Honor, it has been agreed that I might lead the witness to the appropriate page in the interest of saving time.

Will you turn to page 80 of your cash receipts book for 1945, Mr. Saraga?

Mr. Hagerty: Counsel, may we have the exhibit number of the cash receipts book?

The Court: All right.

Mr. Drewes: The witness is referring to Exhibit No. 40, counsel.

Q. You have that page? A. Page 80.

Q. Does there appear thereon a receipt from one Leavy in the [162] amount \$1350? Cash receipts for the year 1945, do you have the right book?

A. This is 1946 I am looking at.

Q. Turn to your 1945. A. '45.

Q. I believe it is on page 80, Mr. Saraga.

A. I have it.

The Clerk: With reference to cash receipts book 40-B.

Q. (By Mr. Drewes): Does there appear thereon, Mr. Saraga a receipt in the amount of \$1350 from one Leavy? A. Right.

Q. And is the date the 31st of July, 1945?

A. Yes, sir.

Q. Similarly on that page does there appear the receipt of five checks in the amount of \$3600 from Mr. Leavy? A. There is.

Q. On the same date? A. There is.

Q. Now will you please turn to page 34, and does there appear thereon a receipt of \$7,000.09?

(Testimony of Moe Saraga.)

A. There does.

Q. From one Leavy dated the 2nd of August, 1945? A. Yes, sir.

Q. And will you kindly turn to page 86, Mr. Saraga. Do you have that page? [163]

A. Yes, sir.

Q. And does there appear thereon a receipt of \$6500 from the Army and Navy Store dated August 6th? A. There is.

Q. 1945? A. Yes, sir.

Q. Now, if you will turn, Mr. Saraga, to page—to your disbursements—I haven't the page number. November, 1945. Page 127, disbursements for 1945.

A. Yes, sir.

Q. Does there appear thereon a disbursement—do you have it—in the amount of \$7725, dated the 15th of November?

A. I can't see that one. I must be looking at the wrong book.

Q. Do you have the right book, 1945 disbursements? A. 1945 cash disbursements.

Q. Page 127? A. Page 127.

Mr. Hagerty: The Army and Navy Store—there it is.

A. Oh, yes.

Q. (By Mr. Drewes): Does there appear thereon a disbursement to the Army and Navy Store in the amount of \$7725, Mr. Saraga? A. There is.

Q. Do you recall, Mr. Saraga, the nature of that disbursement or why the disbursement was [164] made?

(Testimony of Moe Saraga.)

A. There was a refund of \$6500, a deposit we received, and the difference between \$6500 and \$7725 was—there was also a refund of 49 uniforms at \$25 each, since we had not completed on the first order.

Q. And why was the refund—what brought about the refund of \$6500?

A. We couldn't deliver the goods.

Q. And the difference between the \$6500 and the sum of \$7725, I understand, was a refund of an overpayment?

A. Of an overpayment.

Q. Now if you will turn to your receipts book for 1946, page 80—I beg your pardon, page 50.

A. 50?

Q. Page 50, Mr. Saraga, of 1946. You have got that page?

A. Yes, sir.

Q. Do you find thereon a receipt in the amount of \$7724 and dated March 19, 1946?

A. I don't know if I am looking at the right book. Is this 1946?

Q. 1946, March 19th.

A. March 19th—

Q. Page 50. The amount is \$7724.

Mr. Lewis: Your Honor, I would like to object to that. That is, it may be permitted to go in subject to the motion to strike if they do not connect it up. [165]

The Court: With that understanding then, it may be admitted, counsel reserving motion to strike.

The Witness: I have it, sir, \$7724.

Q. (By Mr. Drewes): And that was shown as a receipt from whom?

A. Lewis Leavy.

(Testimony of Moe Saraga.)

Q. From Lewis Leavy? A. Yes.

Q. And now if you will finally turn to page 33 of your disbursements book for 1946. 1946, again.

A. Yes, I am looking.

Q. Disbursements. A. Disbursements.

Q. Page 33. A. 1946 or '45?

Q. '46, Mr. Saraga. A. Yes.

Q. Do you have that page?

A. Yes, cash disbursements.

Q. Is there a disbursement shown thereon for June 24, 1946, in the amount of \$7724?

A. Yes, sir.

Q. And to whom is that disbursement made as shown by the book?

A. To Lewis Leavy. [166]

Q. To Lewis Leavy. A. Yes.

Q. Now, Mr. Saraga, you have testified that you know Mr. Leavy——

Mr. Lewis: I want my objection to run, your Honor, subject to the motion to strike, to this whole line of testimony.

The Court: It may be presented in the record. The objection is noted.

Q. (By Mr. Drewes): You have testified that you know Lewis Leavy? A. Yes.

Q. That you have had business dealings with him? A. Yes, sir.

Q. Do you know Mr. Milt Olender?

A. No, I have only met him the first time yesterday.

Q. The first time yesterday? A. Yes.

(Testimony of Moe Saraga.)

Q. You have testified that a number of entries in your books indicate receipts and disbursements from Lewis Leavy. In those dealings with Mr. Leavy did you understand that he was dealing for himself or someone else?

A. For someone else.

Mr. Lewis: Object to that.

The Court: Overruled. [167]

Mr. Lewis: It is based on hearsay.

The Court: Overruled.

Q. (By Mr. Drewes): And for whom was he dealing?

The Court: Will you repeat the answer?

A. For someone else.

Q. (By Mr. Drewes): For whom was he dealing or whom did he represent?

A. Mr. Olender.

Q. Mr. Milton Olender? A. That's right.

Q. And you have testified as to certain entries——

Mr. Lewis: I would like to have the record read and exception is noted on each of these statements to the ruling that they can go in as to Mr. Leavy.

The Court: The objection may be noted. The objection is overruled.

Q. (By Mr. Drewes): You have testified as to one or two items in your books wherein transactions with the Army and Navy Store are noted.

A. Yes, sir.

Q. Who is the owner of that organization?

A. Mr. Olender.

Mr. Lewis: I object to that as merely an opinion,

(Testimony of Moe Saraga.)

as asking for a legal conclusion of this witness.

The Court: If he knows in the trade and in the trade [168] parlance who the owner of the Army and Navy Store is—do you know that?

A. I was told that it is Mr. Olender, owns the business.

Q. By whom? A. By the trade.

Q. (By Mr. Drewes): You know with whom you customarily deal, do you not? A. I do.

Q. And when you testify that there are entries in your books reflecting transactions with the Army and Navy Store, you knew that that store was owned by and operated by Mr. Olender?

A. I did.

Q. Mr. Saraga, you have testified as to two disbursements which appear in your books. Have you brought with you in response to a subpoena your retained cancelled checks reflecting those two disbursements? A. I have.

Q. Will you hand them to me, please?

A. (Witness producing documents.)

Q. These two checks bear your signature, do they not? A. They do.

Mr. Drewes: I understand it is stipulated these two checks may be accepted into evidence, your Honor.

The first check dated November 15, 1945— [169]

The Court: And the amount, will you read the amounts, counsel, so we may follow these?

Mr. Hagerty: We have no objection.

(Testimony of Moe Saraga.)

Mr. Drewes: In the amount of \$7725, the amounts heretofore read from the books.

The Court: And paid to the order of whom?

Mr. Drewes: Pay to the order of the Army and Navy Store.

The Court: And the other check reads?

Mr. Drewes: The second check is dated June 24, 1946, in the amount of \$7724 and is payable to the order of Lewis Leavy.

The Court: Who signed these checks?

Mr. Drewes: Mr. Saraga testified, your Honor, he signed those checks.

The Court: You signed those checks?

The Witness: I did.

The Court: They were charged to your account?

The Witness: That's right.

The Court: They may be admitted.

The Clerk: U. S. Exhibits Nos. 41 and 42 in evidence.

(Thereupon the checks above identified were received in evidence and marked, respectively, U. S. Exhibits Nos. 41 and 42.)

Q. (By Mr. Drewes): Mr. Saraga, I hand you Exhibit No. 41. [170] Will you look at the reverse side of that exhibit and tell me what endorsements appear thereon?

Mr. Hagerty: I will object to that, your Honor. The document speaks for itself.

The Court: Overruled.

A. Army and Navy Store, M. Olender.

(Testimony of Moe Saraga.)

Q. (By Mr. Drewes): And as to Exhibit 42, will you please read the endorsements that appear thereon?

A. Lewis Leavy, Milton H. Olender.

Mr. Drewes: Thank you. I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Saraga, you did not know Milton Olender at all during the period of these transactions?

A. That's right.

Q. You dealt entirely with Mr. Leavy?

A. That's right.

Q. Would you have sold Mr. Olender directly during this period of shortages?

Mr. Drewes: Objected to as calling for the opinion and conclusion of the witness.

Mr. Lewis: He knows whether he would have sold him or not.

The Witness: Would you repeat that question?

Q. (By Mr. Lewis): Would you have sold Mr. Olender at all during the period of 1945 and '46 if it had not been for Mr. [171] Leavy?

A. We were not in a position to sell any goods at the time.

Q. There was a shortage and you were taking care of your regular customers?

A. There was a shortage at that time.

Q. And Mr. Leavy was a large customer of yours?

A. That's right.

Q. You had many transactions with him?

(Testimony of Moe Saraga.)

A. That's right.

Q. Now calling your attention to the Exhibit 40, page 80, cash receipts, July 31, 1945, \$1350.

A. Page 80—yes, sir.

Q. It is the first item there from Lewis Leavy, \$1350. Do you know of your own knowledge whether that cash receipt was for Mr. Leavy's purchases or Mr. Olender's at the same time Mr. Olender sent you the \$18,000 worth of checks?

A. I am trying to find that item. Page 80, you say?

Q. Yes. A. \$1780, is it?

Q. \$1350 is the first item and then there are five checks for \$3600?

A. I am sorry, but I don't see that item on page 80 here.

The Court: Will you help him, Mr. Lewis, please? Show him where those items are.

Mr. Lewis: I don't think you have the right book there. [172]

Mr. Drewes: Try 40-B.

Mr. Lewis: Here it is.

A. The first item?

Q. Yes, the first item \$1350. Do you know whether that item was received from Mr. Leavy for his own account or Mr. Olender's account?

A. That was for another account of Mr. Leavy's.

Q. That was not Mr. Olender's?

A. No, not that item.

Q. Turn to page 84 of the 1945 book. There is an item there \$3036.56, and also an item Lewis

(Testimony of Moe Saraga.)

Leavy \$7,000.09. Can you tell from your books whether the first item of \$3036.56 or from your own knowledge, was for Mr. Olender's account or some other party of Mr. Leavy's?

A. The item of \$3036.56 was for some other account of Mr. Leavy's.

Mr. Lewis: That is all.

Your Honor, I would like to renew my motion to strike those two items of \$3036.56 on page 84, and on page 80 the item \$1350, as this witness has testified they were some other account and were not identified as Mr. Olender's account.

Mr. Drewes: What was the first item you referred to?

Mr. Lewis: \$1350.

Mr. Drewes: And the other one?

Mr. Lewis: \$3036.56. It appears—there was conversation [173] when he was reading it.

Mr. Drewes: The \$1350 item, your Honor, may go out. I have no objection to that.

As to the other item, \$3036.56, I don't recall questioning the witness about that item.

Mr. Lewis: Well, it appears under Lewis Leavy. It was not our client's item and we didn't want it to be in evidence, your Honor.

Mr. Drewes: That may go out.

The Court: Both items may be stricken from the record then, and the Jury is entitled to disregard reference thereto under the stipulation of counsel. They are entirely irrelevant to this controversy.

Mr. Lewis: That's correct.

(Testimony of Moe Saraga.)

The Court: Are you finished with this witness?

Mr. Lewis: Yes, your Honor.

Mr. Drewes: Yes.

The Court: There are no further questions, because when I release him I assume you will return to your home, will you?

The Witness: Yes, sir.

Mr. Drewes: That's correct.

Mr. Lewis: That's correct.

The Court: You are sure now there are no further questions?

Mr. Lewis: We will stipulate.

The Court: When are you leaving? [174]

The Witness: I would like to leave this afternoon.

The Court: This afternoon by plane, are you?

The Witness: Yes.

Mr. Drewes: It is so understood.

The Court: All right, sir, you may be excused. And the witness is leaving the books here on the condition they be returned.

Mr. Drewes: They will be returned to him at the end of the trial.

(Witness excused.)

LEWIS LEAVY

was recalled as a witness on behalf of the Government, previously sworn.

The Clerk: Please restate your name for the record.

A. Lewis Leavy.

(Testimony of Lewis Leavy.)

Direct Examination
(Resumed)

By Mr. Drewes:

Q. Mr. Leavy, I show you Government Exhibit No. 42, which is a check payable to yourself and drawn by Mr. Saraga. A. Yes, sir.

Q. This has previously been introduced in evidence. Will you tell me—will you examine that check? A. Yes.

Q. Examine the endorsements on the reverse side. [175] A. Yes, sir.

Q. And tell what disposition you made of that check? A. I turned it over to Mr. Olender.

Q. Do you know Mr. Olender's signature?

A. Oh, I have seen it. I think—I think——

Q. Does that appear to be his signature?

A. The last part of it. I remember how he wrote his "Olender"—I think that is correct.

Q. That appears to be his signature?

A. Yes.

Q. When you testified earlier this morning, Mr. Leavy, you could not recall persons to whom you had made sales of Mr. Olender's suits in 1945 beyond the specific sales to Mr. Lerman. Upon further reflection do you recall now any additional sales made by you? A. No, I don't.

Q. In that period of time? A. No.

Q. And how many suits did you testify that you had sold beyond those?

A. From 250 to 300, 325. I don't remember exactly. It was a small amount.

(Testimony of Lewis Leavy.)

Q. Referring again to Exhibit No. 42, you testified that you turned this check over to Mr. Olender?

A. Why, Mr. Leavy? [176]

A. Because they belonged to him.

Mr. Drewes: I have no further questions.

Mr. Hagerty: No questions, your Honor.

The Court: This witness is excused?

Mr. Drewes: He is excused.

Mr. Lewis: Yes.

The Court: Same order. The witness is excused.

The witness may leave.

The Witness: I can leave?

The Court: Yes, you can leave the jurisdiction.

Mr. Drewes: Your Honor, may the witness be excused on the understanding that he may be subject to recall later in the trial?

The Court: Where is your home?

The Witness: My office is right down the street here.

The Court: You live in this jurisdiction, do you?

The Witness: That's right.

Mr. Drewes: Subsequently it may be necessary to recall him.

The Witness: Okay, I will be at the office any time you want me.

(Witness excused.)

SETH L. ROOT

was called as a witness on behalf of the Government, sworn. [177]

The Clerk: Please state your name, your address and your official capacity to the Court and to the Jury?

A. Seth L. Root, 937 Liberty Avenue, El Cerrito, California. Internal Revenue Agent, U. S. Treasury Department.

Direct Examination

By Mr. Drewes:

Q. Mr. Root, you were assigned to this particular case at the beginning of its investigation?

A. Yes, that is correct.

Q. You have been following the case until the present moment? A. Yes.

Q. State if you will when you were first assigned to begin the investigation of the case?

A. Well, the returns for 1944 and '45 were assigned to me some time in the early part of December of 1947.

Q. Will you state particularly the origin of the investigation? A. I don't—

Q. Will you state then—let me reframe the question.

Will you state, please, how the investigation began?

A. Well, when the returns came to me there were associated with the returns certain information from—

Q. Go ahead.

(Testimony of Seth L. Root.)

Mr. Lewis: I object, your Honor, to this questioning as to why the investigation started. Let him state what he [178] found.

The Court: I will sustain the objection.

Q. (By Mr. Drewes): Mr. Root, I show you the Government's Exhibits 30 through 33, inclusive, which have been identified as reports of unusually large transactions of currency, Treasury forms usually referred to as "TCR's," and ask you if those were given to you in connection with the taxpayer's returns? A. Yes, they were.

Q. And you undertook to make an inquiry as to the nature of those transactions reflected on Government's Exhibits 30 through 33?

A. Yes, those were checked subsequently.

Q. You have, Mr. Root, been seated at counsel table since this trial began this week?

A. Yes.

Q. And you have heard the witness, Mr. Blanchard, testify as to certain transactions which he was making inquiries entered into by one Goodman?

A. Yes.

Q. Was that Goodman matter, the report of the Goodman matter, referred to you in connection with your receipt of the taxpayer's '44 and '45 returns?

A. It was.

Mr. Lewis: I will object, your Honor, to that question, [179] what reports were referred to him at the start of his investigation. I think counsel should confine his statements to what he found in the investigation.

(Testimony of Seth L. Root.)

The Court: Well, this is a preliminary question.

Mr. Drewes: It is all preliminary, your Honor.

The Court: I will overrule the objection. He was assigned to that phase of the matter, and we will proceed from there.

Q. (By Mr. Drewes): Your answer is "yes"?

A. Yes.

Q. Did you in the course of the investigation interview the defendant Mr. Milton Olender?

A. Yes, that was the first step in my examination of the returns.

Q. Actually I presume you must have interviewed him on a number of occasions?

A. Yes.

Q. Can you state to the best of your recollection when you first talked to the defendant?

A. I believe it was December the 29th of 1947. We had a preliminary meeting in my office and at the time Mr. Olender said that he was very busy taking year-end inventory and asked if I could defer the commencing of the examination until after the first of the year, and I said that was agreeable.

Q. And did you then agree upon a subsequent date for [180] extensive conference?

A. Yes, he said if I could get in touch with him sometime after January the 10th of '48 he would be agreeable.

Q. And then subsequent to that date did you meet with him? A. Yes.

Q. And where, Mr. Root?

A. January 12th I met with him at his place of business, 1026 Broadway in Oakland.

(Testimony of Seth L. Root.)

Q. Was there anyone else present at the time?

A. There were sales personnel in the store. I mean, I was working in the back end of the store at a small table there at the side of the room.

Q. How much time did you spend in the store on that occasion? A. Well—

Q. Approximately.

A. Several days I spent there. I don't recall.

Q. You were there continuously for several days?

A. Well, I was out for lunch, and whether I had other matters going—I couldn't say that I was there all day every day, but I was there the good part of several succeeding days, yes.

Q. Now during the course of your—of that period of time, when you were in the store and during the course of your conversations over that period of time with the defendant, [181] did you make inquiries of him as to the management and operation of the Army and Navy Store? A. Yes.

Q. And as a result of those inquiries what did you learn concerning the operation and management of the store?

A. Well, he had several employees in this store. He is, however, the sole proprietor of the store and everything.

Q. Was he the manager of the store?

A. He is the manager. He has no one who—no purchasing agent or anything like. He supervises.

Q. He does not employ a manager?

(Testimony of Seth L. Root.)

A. No.

Q. He does the active management and operation of the store himself?

A. Yes. There may be some one in charge when he steps out, but he essentially is the manager when he is there.

Q. How many salesmen did he have, roughly?

A. Oh, at the time I think there were two or three. I don't recall the exact number.

Q. Did he employ a bookkeeper?

A. Only on a part-time basis. I believe there was a girl that he said came in on the average of about one hour a day to post transactions which might have occurred. Now whether she came in every day or not, it was on the average of one hour a day. [182]

Q. Do you recall her name?

A. Her name is Vera Manger.

Q. Do you recall whether the defendant told you where she was employed?

A. Yes.

Q. Elsewhere?

A. She was employed as a full-time bookkeeper at the Dorfman Hat Company, I believe the title of the firm is. Around the corner from Mr. Olender's place of business.

Q. In connection with the maintenance of the books of the Army and Navy Store, did the defendant tell you what his activities were in connection therewith.

A. Well, I mean—

Q. Specifically what—I will withdraw the question and rephrase it.

(Testimony of Seth L. Root.)

Specifically what if anything did the defendant tell you he did in connection with the maintenance of the books and records of the store?

A. Well, he would supervise the maintenance of the books and records, in the sense that this is a, well, not a one-man store but a smaller store, and so that he was in a much more intimate contact of books than one—than would be true in a larger firm. He would furnish the data to the girl for posting and I think, in fact, some of the posting was done by him. I can recall some instances where there was [183] some postings that he made.

Q. You examined the books and records of the Army and Navy Store in the course of your visit?

A. Yes, I did.

Q. To the best of your recollection will you describe of what they consisted?

A. Well, there was a cash book which reflected the receipts or sales of the business, a check register which would reflect the disbursements. I believe that all the disbursements were eventually accounted for by check, in that any cash disbursements out of the register were reimbursed by checks drawn on the firm. There was a general journal and a ledger.

Q. Specifically, Mr. Root, how were receipts handled?

A. Mr. Olender told me that the receipts were compiled from the cash register tapes at the end of the day. That is cash business, that he carried no receivables on the books, so that the receipts would be reflected on the cash register tapes.

(Testimony of Seth L. Root.)

Q. There were no receivables, so that the receipts were reflected daily from the cash register?

A. Yes.

Q. State if you know who made the daily entries from the cash register?

A. Well, I assume that he furnished the information to or furnished the tapes to the girl who would do the posting. [184]

Mr. Lewis: I would like to ask to strike that last answer—he “assumed.” Let him state if he knows how it was handled.

The Court: We might take the noon adjournment, ladies and gentlemen, and we will resume at 2:30 this afternoon. The same admonition to you.

(Thereupon a recess was taken to the hour of 2:30 p.m. this date.) [185]

September 18, 1952, 2:30 P.M.

SETH L. ROOT

resumed the stand, and having been previously duly sworn, testified further as follows:

Mr. Drewes: If your Honor please, I believe that a question had been asked and an objection interposed. I will withdraw the question.

Q. (By Mr. Drewes): Mr. Root, state, if you know, who in the Army-Navy Store took the daily readings from the cash registers?

A. Mr. Olender.

Q. In the course of your conversations with Mr. Olender concerning the operation and management

(Testimony of Seth L. Root.)

of his store, were you at any time referred to any other person for answers to any questions that you might ask? A. No.

Q. Did you, Mr. Root, ask Mr. Olender, or any representative of his, for a comparative net worth statement?

A. Will you restate? I don't follow you.

Q. Did you ask the defendant or anyone representing him for a comparative net worth statement?

A. I asked Mr. Olender for a comparative net worth statement, yes.

Q. And why did you ask him for such a statement? [186]

A. Well, I had these large cash transactions as revealed by these P. C. R.'s.

Q. You are referring to the Government's Exhibits No. 30 to 33 that have been previously mentioned?

A. Yes, those ones that I had here this morning that you handed to me. In addition, I had these Goodman transactions which involved a series of cashier's checks.

Mr. Lewis: Your Honor, I would like to have that stricken from the record because Goodman transactions were in 1944, not the years in this indictment.

Mr. Drewes: I will withdraw the question, your Honor.

The Witness: May I state something in here?

Mr. Drewes: The question has been withdrawn.

Q. (By Mr. Drewes): You knew, did you not,

(Testimony of Seth L. Root.)

Mr. Root, that the defendant's books in the Army-Navy Store were not complete? A. Yes.

Q. How did you know that they were not complete?

A. Because the Goodman transactions were not reflected on the books.

Mr. Lewis: Your Honor, again I ask that that be stricken from the record because the Goodman transaction admittedly occurred in 1944, a year previous to the indictment.

Mr. Drewes: I think the purpose for which the question [187] was asked, your Honor, that is immaterial. The question was as to the status.

The Court: The motion is denied. It may remain.

Q. (By Mr. Drewes): Mr. Root, you asked for a joint investigation with the special intelligence unit in this matter?

A. Subsequent to receiving Mr. Olender's net worth statements, yes.

Q. And from that time on Mr. Whiteside worked with you in the investigation of this case?

A. Yes, under our regulations Mr. Whiteside is in charge of the investigation and I am just a co-worker.

Q. And state, if you recall, Mr. Root, when you finally made your report in this matter?

A. My report as I recall went in in 1949. I am not certain as to the exact date on that.

Q. Early or late in the year, or do you recall?

A. I believe it was early in the year.

(Testimony of Seth L. Root.)

Q. Mr. Root, did you compare the books of the Army-Navy Store with the taxpayer's returns for the years 1945 and '46? A. Yes, I did.

Q. And what was the result of that comparison?

A. They were in substantial agreement.

Q. They were in substantial agreement?

A. Yes. [188]

Q. During the course of your investigation did you expand your investigation to include years other than 1945 and '46?

A. Yes, I included some earlier years because I thought it was necessary to get the full picture.

Q. How far back did you go?

A. To January 1st, 1942.

Q. Did you compare the books of the Army-Navy Store with the taxpayer's returns for those years?

Mr. Lewis: Your Honor, I object to that question.

The Court: Sustained.

Mr. Drewes: Your Honor, I ask you to reconsider for just a moment. You will recall that the taxpayer's return for early years were offered and admitted in evidence for the purpose of supporting the base year.

The Court: What is the base year?

Mr. Drewes: 1944.

The Court: 1944 is the base year. What relevancy would there be as to prior years?

Mr. Drewes: The taxpayer has submitted a net

(Testimony of Seth L. Root.)

worth return for the year 1941 and we want to support the 1944 base by referring back.

The Court: Yes, I remember you stated that the base year was 1944 and then there was coordination or correlation between the earlier years. [189]

Mr. Drewes: To support the accuracy of the 1944 base year we want to offer the taxpayer's return, and did offer them and they were accepted for 1941 to '44.

The Court: All right, without showing I will revise my ruling.

Mr. Lewis: I will still enter an exception on the ruling on the grounds that if it should go into evidence at all, it should be as a matter of rebuttal and when the taxpayer presents his case which might bring forth matters involving 1942, 3 and 4.

The Court: Well, not necessarily. Without extending any discussion on the matter the base period must be further made out by the Government as part of its case, and upon that showing and upon the representation of counsel for the Government I will allow reference made to the earlier returns, and for that limited purpose.

Mr. Lewis: May the exception be noted for the record?

The Court: Yes.

Q. (By Mr. Drewes): Did you compare the books of the taxpayer for the earlier years with the earlier returns?

A. To the extent that they were available. I think the earliest book that was presented to me

(Testimony of Seth L. Root.)

began May 13th of 1943 in which, in the general ledger balances presumably from preceding books were entered there.

Q. As to the years 1943 and '44 were they in substantial [190] accord with the taxpayer's return?

A. Yes, they were.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Root, in the examination of the books of the taxpayer did you find any errors in the years 1945-1946? A. No.

Mr. Lewis: You didn't? Your Honor, that will be all the questions of Mr. Root. Would he remain available in case we want to call him?

The Court: The witness is available.

Redirect Examination

By Mr. Drewes:

Q. Mr. Root, in connection with your last response to the last question asked of you, did you mean by your testimony that there were no omissions from the books of the taxpayer? A. No.

Mr. Lewis: Your Honor, I object to that question as leading and suggestive.

The Court: Sustained. The answer may be stricken.

Q. (By Mr. Drewes): You have testified that there were no errors found by you on the books of

(Testimony of Seth L. Root.)

the taxpayer for the years 1945-1946. Do you wish to explain your answer in any way? [191]

A. Except that the books and records as they were presented were in agreement with the tax returns. There were no records in the books themselves. Any errors that were made were from things that weren't on the books.

Q. You mean any errors were errors of omission?
A. Errors of omission.

Recross-Examination

By Mr. Lewis:

Q. Mr. Root, what were the errors and omissions in the books?

Mr. Drewes: If I may object, I haven't finished questioning this witness.

Mr. Lewis: Pardon me.

Redirect Examination

(Continued)

By Mr. Drewes:

Q. Mr. Root, I will show you the Government's Exhibits Nos. 34 and 35 which you will recall are two checks, each in the amount of \$2500 which have heretofore been introduced into evidence and which have been identified by the witness Leavy as sums received by him from the sales of suits belonging to Mr. Olender, and which were turned over to Mr. Olender. Do you know of your own knowledge where and how those two checks appear on the books of the taxpayer?

(Testimony of Seth L. Root.)

A. These checks appear as a credit to his capital account.

Q. And——

A. As a contribution of capital from the taxpayer. [192]

Q. How long have you been engaged in accounting work, Mr. Root? A. Since 1946.

Q. And you have been employed by the Bureau of Internal Revenue since that time?

A. Yes.

Q. You have made a number of audits and examined a great number of accounting books and records in the course of that work?

A. Yes.

Q. Based on your background? A. Yes.

Q. Based on your background and experience over that period of time would you say that the credit to the capital account is a proper way to handle receipt from sales?

A. No, sir, I wouldn't.

Mr. Hagerty: I object to that, your Honor, as no proper foundation. He isn't a certified public accountant or anything.

Mr. Drewes: I think he has had ample background.

The Court: I assume the jurors have the same difficulty I have in hearing. We have a problem. It is impossible to do any work with that noise. I am at a loss to find a solution unless the Marshal could ask these men to refrain for the balance of the afternoon until four o'clock. We might [193]

(Testimony of Seth L. Root.)

then recess until two tomorrow afternoon and that will give an interval of time to clean up that street. It is impossible to try a case under these conditions. This is an important case to the Government as well as the defendant as all criminal cases are and under the circumstances I feel that in the interests of justice we should have some definite course of conduct. Mr. Clerk, will you do this for me? Ask the Marshal to request these people to refrain from working until four o'clock today. We will resume tomorrow afternoon at two o'clock. That will give them some time. Maybe they can put a night shift on. They have to do their work, too. We will take a five or ten minute recess with the same admonition, ladies and gentlemen.

(Short recess.)

Mr. Drewes: If your Honor please, the witness advised me during the recess that he had misunderstood the question that was put to him by counsel. I had asked him, the record will show, whether or not the books of the defendant were in substantial agreement with the tax returns filed, and when Mr. Lewis asked him whether or not he found any errors in the books he understood Mr. Lewis to refer to my question as to whether or not the tax returns and the books were in agreement, is that correct?

Mr. Lewis: Your Honor, I think that is a matter of argument. [194]

The Court: I think so. I think that the witness

(Testimony of Seth L. Root.)

is entitled to make any explanations he desires in the light of any questions you pose to him, but the question and the answer as originally submitted may stand in the record. Mr. Lewis asked him a question and he is entitled to make an explanation if he so desires, and counsel may examine him on any explanation. Or if you wish to make an explanation, Mr. Witness, but otherwise the record will stand as is.

Mr. Drewes: Very well, your Honor. Then may I re-put the question to the witness?

Q. (By Mr. Drewes): Mr. Root, do you wish to explain your answer to Mr. Lewis' question?

A. Yes. I understood Mr. Lewis' question to follow in the line of your question, whether the books and records were in agreement with the return, and he put it from the opposite point, from the negative standpoint, were there any errors.

Mr. Hagerty: I will object to that as not being responsive, your Honor.

The Court: The objection is overruled.

Mr. Drewes: I have no further questions, your Honor.

Mr. Lewis: Your Honor, I have the books of Mr. Olender's business, and a chart that we have prepared during the noon hour showing what the books show, and all of the Goodman transaction evidenced at this morning's hearing. I would suggest that in cross-examination of Mr. Root, that he have [195] an opportunity—and they could put on their next witness—Mr. Root is not in very good

health—to examine these books and this chart and see if he agrees with us.

The Court: That may facilitate his examination. You might do that, Mr. Root, please.

Mr. Lewis: And they can proceed with the next witness.

MELBOURNE C. WHITESIDE

called as a witness on behalf of the Government, sworn.

The Clerk: Would you state your name, your address and your official capacity to the Court and to the Jury?

The Witness: Melbourne C. Whiteside. My address is 32 Lindberg Street, San Mateo, California. I am a special agent in the Intelligence Division of the Internal Revenue.

Direct Examination

By Mr. Drewes:

Q. Mr. Whiteside, how long have you been an employee of the Treasury Department?

A. Eighteen years.

Q. How long have you been a special agent, Intelligence Unit? A. Past four years.

Q. Were you a revenue agent before that?

A. Yes, I was a revenue agent approximately eight years prior to that. [196]

Q. Are you a licensed public accountant, Mr. Whiteside? A. Yes, sir.

Q. Mr. Whiteside, I show you the Government's Exhibits No. 24 and No. 25 for identification which

(Testimony of Melbourne C. Whiteside.)

have been identified as net worth statements furnished by the taxpayer showing his net worth as of the 31st day of December, 1941, and the last day of December, 1947, and the supporting papers, or the papers in support thereof which were furnished by the taxpayer at the request of the Government. Did you conduct an examination after the exhibits which you have before you were received by the Government?

A. My original assignment to this case was made as a result of the request from the revenue agents for a joint investigation. I believe that request was received in our office on October 7, 1948, and I was assigned to the case on October 12th. This exhibit is dated September 13th, so my investigation started subsequent to the submission of this.

Q. Did you, however, examine and conduct an investigation of the data which is shown on the exhibits which you have before you?

A. Yes, sir, that is correct. After we started our investigation our first step was to verify the items contained in this net worth statement.

Q. Will you explain the nature and scope of that investigation and verification? [197]

A. Well, we went down these items one by one. If they were bank accounts we would go to the banks to verify the amounts as shown on these statements. The statement as submitted is as of December 31, 1941, and December 31, 1947. In our investigation we got balances to break it down year by year as we verified the items.

(Testimony of Melbourne C. Whiteside.)

Q. Did you examine escrow records of title insurance companies? A. Yes, sir.

Q. Bank accounts?

A. We examined bank accounts, escrow records, grantee-grantor records at the county recorder's offices and various other accounts.

Q. As a result of your work did you find any omissions from the net worth statement as tendered by the taxpayer?

A. Yes, we found that the taxpayer had omitted \$5,000 worth of Asturias stock from the net worth statement, and also a savings account of Mrs. Olender had not been included.

Q. How did you locate the savings account of Mrs. Olender, Mr. Whiteside?

A. Mr. Root had these T.C.R. reports and one of those was as a result of cashier's check being purchased by Mr. Olender for cash. The cashier's check was deposited in Mrs. Olender's bank account.

Q. Will you tell me, Mr. Whiteside, to which of the T.C.R.'s [198] you referred, Government Exhibits 30 through 33?

A. It is none of these, sir.

Q. Possibly I overlooked one.

A. Oh, I am sorry, here it is. It is Exhibit No. 33.

Q. That is the Exhibit which shows the purchase of cashier's check in the amount of \$3,000 with \$1,000 bills? A. That is correct.

Q. And you traced that cashier's check into a savings account, you say?

(Testimony of Melbourne C. Whiteside.)

A. Into the savings account of Mrs. Olender.

Q. In what bank?

A. That was the Bank of America, main office, 12th and Broadway, Oakland.

Q. What was the balance of that account, if you recall, at the time?

A. The balance at the end of 1946 was \$10,000 plus—I think \$10,070, or something like that. It was \$10,000 deposit plus interest accrued.

Q. And you referred to the investment in Asturias Company. How did you locate the second investment in that concern?

A. Well, we located the records of the Asturias Company itself and went and looked to see how this stock was purchased, and in verifying that we found that there was an additional \$5,000 invested.

Q. Beyond the one that was shown in the taxpayer's return? [199]

A. That is correct.

Q. Do you know, Mr. Whiteside, whether the omitted investment in the Asturias corporation was the first or the second of the two investments which have been put into the record in this trial, that is, the July investment or the December investment?

A. It was the July investment, July 17th I believe.

Q. Mr. Whiteside, you heard testimony this morning of Mr. Leavy and you recall Government's Exhibits Nos. 34 and 35 admitted in evidence were identified by him as proceeds of sale to one Lerman on behalf of Olender, and that the proceeds were given by him to Mr. Olender. Did you find an entry

(Testimony of Melbourne C. Whiteside.)

on the books of the taxpayer in the amount of \$5,000 reflected by those two checks?

A. Yes, we found that these checks had been credited to Mr. Olender's capital account as an additional investment.

Q. How did you determine, Mr. Whiteside, that that capital—that that credit to the capital account was in effect a sale?

A. Well, we were interested in any contributions to his capital account, so through the deposit tag at the bank we found that the deposit was a cashier's check from the American Trust Company, main office, Oakland. We traced the cashier's check to the purchaser of the cashier's check at the American Trust and found that they had been purchased by Mr. Lerman [200] and that they were payable to Lewis Leavy. We inspected the checks at that time. We talked to Mr. Lerman. He stated that he had purchased these sailor suits from Mr. Leavy and was unaware at that time that Mr. Olender had anything to do with them. We later talked to Mr. Leavy, and he told us that they were Mr. Olender's suits and that he had sold them for Mr. Olender.

Q. I show you, Mr. Whiteside, the Government's Exhibit No. 42 which is a check payable to Lewis Leavy in the amount of \$7724 drawn by Mr. Saraga who testified this morning and endorsed by the payee Lewis Leavy and Milton Olender. In the course of your investigation in this case, Mr. Whiteside, did you look for that receipt on Mr. Olender's books?

A. Yes, we did.

(Testimony of Melbourne C. Whiteside.)

Q. That is on the books of the Army & Navy Store?

A. This particular check is not recorded on the books of the Army-Navy Store. The check itself was deposited in Mr. Olender's personal bank account.

Q. His personal bank account?

A. Yes, sir.

Q. Mr. Whiteside, did you have occasion to ask the defendant or anyone representing him for his cancelled checks, his personal cancelled checks for the years 1945 and 1946?

A. I asked Mr. Ringo. I was not permitted to talk to Mr. [201] Olender after the first week of the investigation.

Mr. Lewis: Your Honor, I ask that that be stricken. It is not responsive at all.

The Court: The motion is denied.

Q. (By Mr. Drewes): You asked Mr. Ringo for those checks? A. That is correct.

Q. And did you receive them?

A. We received the checks for 1946, and there were certain checks for 1945 which were brought out, but they were not all produced.

Q. In other words, you got all of the 1946 checks and some of the '45? A. And some of the '45.

Q. You testified, Mr. Whiteside, to the best of your recollection there was a balance of something over \$10,000 in Mrs. Olender's account in 1946, at the time of your investigation. State, if you can recall, the balance in that account as of the 31st day of

(Testimony of Melbourne C. Whiteside.)

December, 1947, which, of course, is the date of the taxpayer's net worth for that year.

A. No, that is not included in this. There was a withdrawal during 1947, to the best of my recollection, of around six thousand some odd dollars.

Q. As of the last day of 1947?

A. That is correct. [202]

Q. In the neighborhood of \$6,000?

A. \$6,000 plus.

Q. With respect to the Lerman transaction which you have testified were entered in the books of the Army-Navy Store as a capital contribution, did they appear in the books in any other form? In other words, could it have been a duplicate entry?

A. No, there couldn't have been a duplicate entry in that type of books that he kept. It was a credit to the capital account.

Q. And the \$5,000 item represented the proceeds—representing the proceeds from that sale did not appear in the books of the taxpayer in any other form or any other place? A. No, sir.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, didn't that \$5000 item come from cashier's checks procured in January, 1944, on what is known as the Goodman transactions?

A. Repeat that question.

Q. Didn't the \$5,000 come from cashier's checks that were taken, bought for cash in January, 1944?

(Testimony of Melbourne C. Whiteside.)

In other words, was there not \$20,500 worth of cashier's checks purchased for cash in January, 1944, by Mr. Olender? Do you remember that item? The so-called Goodman checks? [203]

A. The Goodman checks? That was investigated by Mr. Blanchard. I personally did not see these checks at the bank, the Goodman checks themselves.

Q. Then you do not know anything about those checks?

A. The Goodman checks or the \$5,000 from Mr. Lerman?

Q. We will start out with the cashier's checks totalling \$20,500 purchased for cash January, 1944.

Mr. Drewes: I would like to object to starting out there. There was nothing said on direct examination about the Goodman transaction except for the limited purpose of supporting the starting point.

The Court: The objection is overruled. [204]

The Witness: I am sorry, I—

Q. (By Mr. Lewis): I say, didn't Mr. Olender purchase \$20,500 worth of cashier's checks with cash in January, 1944, set forth in that Exhibit as the Goodman checks?

A. I did not check that particular item, Mr. Lewis. That is, I did not go to the bank. I relied upon the investigation of Mr. Blanchard and Mr. Root.

Q. Now, you have stated, however, that \$5,000 out of the Lerman sale was deposited in the store

(Testimony of Melbourne C. Whiteside.)

bank account and credited to Milton Olender's capital account on the books of the store, didn't you?

A. Yes, sir.

Q. Now, if the start of that \$5,000, if that \$5,000 actually was out of the personal funds of Mr. Olender, wouldn't that be the correct bookkeeping procedure when he put that \$5,000 into the store account to credit his investment account?

A. There is no indication that that \$5,000 was a part of the \$20,000 at all.

Q. If it was a part of it wouldn't that be the correct way to handle it?

A. No, it wouldn't be good bookkeeping.

Q. It wouldn't? A. No, sir.

Q. In other words, if you put \$5,000 that is not in the store [205] to that account and not included in your inventory in the store but you deposit \$5,000 to the store account you wouldn't put it in the investment account?

A. The original checks in the instance which you cite should have been recorded in the books, then it would not have been necessary to put anything back in the investment account. It would have been a straight purchase and sale.

Q. But if it was not in the inventory and never put into the inventory previous to this time, and was sold and put in the store account, wouldn't it go into the investment account?

A. Well, if he is reinvesting money, it would go to the investment account, yes, sir.

Q. Didn't you get all the store checks for the

(Testimony of Melbourne C. Whiteside.)

year 1945 during the course of your investigation?

A. I said we didn't get all the personal checks—all the personal commercial account checks for 1945.

Q. But you did get all the store checks?

A. To the best of my recollection I believe we did.

Q. Did you ever make an examination as to the value of the Asturias Import Export Corporation stock?

A. No, sir.

Q. Haven't you got a section in the Bureau of Internal Revenue that determines the worth of stocks and once it is [206] determined that way you keep a record of it?

A. I believe there is a section in the office of the internal revenue agent which makes determinations on the values of securities at any given date.

Q. Tomorrow morning can you bring me in that record, or tomorrow afternoon at two o'clock of the internal revenue agent's office on the Asturias Stock.

A. I will attempt to get it. I don't know who has charge of that, but I will attempt to.

Q. If you can't get the actual record just read it for me.

A. All right, sir.

Q. Now, you say your investigation in this matter started on what date?

A. October 12, 1948.

Q. That was the day you started individually?

A. That is the date it was assigned to me, yes, sir.

(Testimony of Melbourne C. Whiteside.)

Q. What date did Mr. Blanchard of your office start?

A. Mr. Blanchard was never assigned to the Olender case.

Q. Well, he was over asking Mr. Olender questions, wasn't he?

A. He was asking him questions on another matter.

Q. Oh, I see. In the course of your investigation did you talk to Mr. Olender's sister-in-law?

A. I beg pardon—sister-in-law?

Q. Yes, Mr. Olender's sister-in-law. [207]

A. What was her name?

Q. Mrs. Widrin.

Mr. Drewes: Objected to as improper cross-examination.

The Court: Objection overruled.

A. Yes, I talked to Mrs. Widrin.

Mr. Lewis: That is all.

Redirect Examination

By Mr. Drewes:

Q. Mr. Whiteside, I show you the Government's Exhibits Numbers 36 and 37 heretofore admitted in evidence which are registered—consist of two sheets from the register of cashier's checks issued from the American Trust Company, and I also show you two checks payable to the American Trust Company each drawn by Mr. Lerman, one number 6395 dated May 15, 1945, and one number 6393 dated May 14,

(Testimony of Melbourne C. Whiteside.)

1945. Now, you testified, Mr. Whiteside, that you found that the \$5,000 credit to the capital account consisted of a receipt for cashier's check at the American Trust Company and that you had then determined that cashier's check was purchased at the American Trust Company by Mr. Lerman?

A. That is correct.

Q. Are those two checks which are before you the checks of Mr. Lerman to which you referred?

A. That is correct.

Q. And do the Government's Exhibits Numbers 36 and 37 reflect [208] that the cashier's checks which are the Government's Exhibits numbers 34 and 35 were purchased at the American Trust Company by Mr. Lerman tendering the two checks which you have before you?

A. Well, on check number 6395 there is written on the back of it C.C. number 7146 which is the number of the cashier's check purchased. Mr. Lerman himself told us that that was the purpose of these checks, and we verified that at the bank. I mean, this cashier's check register shows the purchase of cashier's checks on the dates of these. [209]

Q. The cashier's check register shows that those two checks dated in May of 1925, drawn by Mr. Lerman, was used to purchase the two cashier's checks which have heretofore been put in evidence?

A. That's correct.

Mr. Drewes: At this time, your Honor, the Government will offer into evidence two checks drawn on the American Trust Company, each

(Testimony of Melbourne C. Whiteside.)

drawn by Mr. Lerman, each in the amount of \$2,500, one dated May 14th, one dated May 15th, 1945.

The Court: They may be marked.

The Clerk: U. S. Exhibits 33 and 34 in evidence.

(Thereupon checks referred to were marked U. S. Exhibits Nos. 33 and 34 in evidence.)

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, I hand you that stipulation. You in one of your conferences wrote it up.

A. Yes, I have seen it.

Q. Are you familiar with it?

A. Yes, I am familiar with it.

Q. Now in the stipulated assets there, I do not think we have any stipulation of fact that he had that amount of assets and liabilities. In your examination did you find any evidence of any other assets that Mr. Olender had [210] on December 31, 1944, that are not included in that stipulation?

Mr. Drewes: I assume your question excludes the items expressly excluded by the stipulation?

Mr. Lewis: That's right.

Mr. Drewes: And also the items to which evidence has heretofore been introduced?

Mr. Lewis: That's right.

A. We found evidence of some "personal posses-

(Testimony of Melbourne C. Whiteside.)

sions which are not included in here and which are not included in the other evidence heretofore submitted.

Q. (By Mr. Lewis): Did you find any evidence of very substantial sums of cash on hand not included in the stipulation during the year 1944?

A. The only evidence or indication that the taxpayer had any cash on hand would have been contained in this net worth statement as submitted by him.

Q. Did you ever talk to Mr. Monroe Friedman about the cash on hand during 1944?

A. No, sir.

Q. Did you ever see Mr. Friedman's affidavit?

A. I saw an affidavit by Mr. Friedman, yes.

Q. In none of your computations in this case did you take into consideration the amount of cash set forth in Mr. Friedman's affidavit? [211]

A. Yes, sir, I did.

Q. Can you point out to me where you did?

A. Not in this. Not in the stipulation. But in computing the deficiency as shown by the indictment, the cash on hand was allowed as claimed by the taxpayer. We got that information through Mr. Ringo.

Q. I mean information given to you by Mr. Monroe Friedman.

A. Mr. Monroe Friedman gave me no information directly.

Q. Well, you had his affidavit available, did you not?
A. I had his affidavit, yes, sir.

(Testimony of Melbourne C. Whiteside.)

Q. But you did not consider that amount of cash?

A. Mr. Olender gave to Mr. Ringo a statement showing the cash on hand as of the beginning of this period and how it was disposed.

Mr. Lewis: I ask that be stricken, your Honor. I want to know if he considered the amount of cash Mr. Monroe Friedman gave him, gave the department in the affidavit, as on hand as of May 5, 1944.

The Court: You may answer.

A. I think it's the same cash. We used Mr. Olender's figures, knowing that he would be more familiar than Mr. Friedman.

Q. (By Mr. Lewis): Did Mr. Friedman testify he counted that money himself?

A. Not to me he didn't.

Mr. Drewes: May he answer and then explain his answer, [212] your Honor?

The Court: Yes.

A. I think that Mr. Friedman did say in his affidavit that he had counted the money.

Q. (By Mr. Lewis): That's right. But you did not consider that amount?

A. I considered the taxpayer's explanation.

Q. You never got the explanation from the taxpayer, did you? You got it from Mr. Ringo?

A. Through Mr. Ringo.

Q. And Mr. Ringo, you heard him testify here the other day, that that was a preliminary estimate?

A. Mr. Ringo outlined a series of questions for Mr. Olender. Among them was how the cash was

(Testimony of Melbourne C. Whiteside.)

disposed of. And Mr. Olender answered in his own handwriting showing the cash disposed from the vault as of the beginning—as of the end of '44, I believe it was \$50,000 left; at the end of '46 there was no cash left. He had disposed of it all.

Q. But you wouldn't take the testimony of the man who had actually counted the money on two occasions?

A. I think the man who owns the money is in a better position to know what he has.

Q. Than the man who counted it?

A. I think Mr. Olender counted it. [213]

Mr. Lewis: That is all.

Mr. Drewes: Are you through?

Mr. Lewis: Yes.

Redirect Examination

By Mr. Drewes:

Q. Mr. Whiteside, do you recall offhand the date of the affidavit of Monroe Friedman referred to by counsel?

A. No, I don't. I recall that there was such an affidavit but I don't recall the date.

Q. I show you this document and ask you if your recollection is refreshed as to the approximate date of the affidavit?

A. Yes, sir.

Q. What is the date?

A. September 13, 1948.

Q. Do you recall the date when the affiant ex-

(Testimony of Melbourne C. Whiteside.)

amined the vault, the cash in the vault of the taxpayer?

A. He states that on—in April of 1944 that they—April 22, to be exact—he met Mr. Olender at the Bank of America.

Q. Mr. Whiteside, in response to question asked you by counsel you stated that Mr. Ringo had propounded questions to the defendant, one of which—the response to one of which set forth the amount of cash that the defendant had had in his bank vault at certain dates, is that correct?

A. That's correct. [214]

Q. And was that shown to you by Mr. Ringo?

A. That is correct.

Q. I will show you, Mr. Whiteside, a photostatic copy of a document and I will ask you if that is a copy of the statement, in questions and answers, that was shown to you by Mr. Ringo and to which you have referred in your testimony?

A. Yes, sir, that is the statement.

Q. Do you know where the original is?

A. No, I do not.

Q. Was the original ever given to you?

A. It was loaned to me but Mr. Ringo took it back and—

Q. You gave it back to Mr. Ringo?

A. That is correct.

Mr. Drewes: If your Honor please, the Government will offer the photostatic copy of the identified document into evidence, limited strictly to the item

(Testimony of Melbourne C. Whiteside.)

referred to as item 19, "Analysis of use of cash in Vault."

Mr. Lewis: Your Honor, I object to that document going into evidence. He has identified it as coming from Mr. Ringo. He has not identified any part of that document as coming from Mr. Olender.

Mr. Drewes: If your Honor will recall, Mr. Ringo testified that in computing the net worth statements for the defendant he propounded to the defendant a number [215] of questions and that the defendant himself furnished the information. Now counsel has brought up the subject on cross-examination on the Government's case in chief. I think that the original has been accounted for. I think Mr. Ringo's statement identifies it, and Mr. Whiteside's further reference to it further identifies it as being the source of information upon which he calculated the amount of cash in vault which the defendant had on the appropriate dates. Now, Mr. Lewis has challenged that and it is entirely appropriate that the Government be entitled to introduce that document in rebuttal.

The Court: This document is in the handwriting—

Mr. Drewes: It is Mr. Olender's, according to Mr. Ringo's testimony. That is, the answers are. The questions are in Mr. Ringo's handwriting.

Mr. Lewis: Your Honor, a further objection to it, it is a confidential communication. We note our objection to all of this testimony.

(Testimony of Melbourne C. Whiteside.)

The Court: The objection is overruled and the offer is limited to the purposes indicated.

Mr. Drewes: Section 19, "Cash in Vault"—

Mr. Lewis: Your Honor, if it goes in, it should be permitted to go in in its entirety.

Mr. Drewes: I have no interest in introducing into evidence information furnished by the defendant beyond the [216] purpose for which it is offered by the Government.

The Court: At the appropriate time you may make your offer.

Mr. Hagerty: If your Honor please, it is in the nature of a letter, if part of the memorandum goes in, the whole memorandum goes in.

Mr. Drewes: They may offer it at the appropriate time if they so desire. It is offered for the one purpose.

Mr. Hagerty: And a further defect, your Honor, that it is purely hearsay, that is a hearsay document, and it has not been identified by the original writer, Mr. Ringo.

The Court: Overruled.

Mr. Lewis: Exception.

The Court: It may be marked.

The Clerk: U. S. Exhibit Number 45 in evidence, with a certain limitation.

(Thereupon handwritten document consisting of questions 15 through 22 received in evidence and marked U. S. Exhibit Number 45.)

Mr. Drewes: With the Court's permission I shall

(Testimony of Melbourne C. Whiteside.)

read item Number 19 to the jury.

Mr. Lewis: Would the reporter please note the exception?

Mr. Drewes: This document is all in individual handwriting—not all, not all in the handwriting of the same [217] person. Item Number 19 is entitled, “Analysis of use of Cash in Vault.” The first item is, “Decrease in 1944, \$6,000.

“Decrease in 1944 (Goodman deal 20550), \$19,000.

“Decrease in 1945, \$42,800.

“Decrease in 1946, \$7,200.

“Total, \$75,000.”

Mr. Drewes: I have no further questions.

Mr. Lewis: No further questions.

Mr. Drewes: That is all, Mr. Whiteside.

(Witness excused.)

The Court: Now, are there any questions that you have?

Mr. Hagerty: No questions.

Mr. Lewis: No.

Mr. Drewes: I believe Mr. Root is on cross-examination.

Mr. Lewis: I don't know whether he is through or not.

Mr. Drewes: Your Honor, Mr. Lewis has handed a number of documents to Mr. Root with the suggestion that if Mr. Root studied them it might accelerate the matter. I haven't had an opportunity to look at them and I am not entirely sure that that is the proper procedure. At least from the prosecu-

(Testimony of Melbourne C. Whiteside.)

tion's point of view. I might suggest that we recess at this time and I will have an opportunity then to look at these documents and discuss with Mr. Lewis to see to what extent we can agree. It may be time will be [218] saved in the long run.

The Court: I have no objection.

Mr. Drewes: Is that satisfactory?

Mr. Lewis: That is satisfactory.

The Court: Any other matters you may have might be the subject of discussion, accounting matters.

Mr. Drewes: Yes, your Honor.

The Court: You have between now and tomorrow afternoon at two o'clock.

Mr. Drewes: Two o'clock.

The Court: Two o'clock tomorrow afternoon. Ladies and gentlemen we will adjourn this case until tomorrow afternoon at two o'clock, and would you advise the Marshal, Mr. Magee, that we are adjourning until two o'clock in order to provide an interval wherein they might finish that work. The same admonition, ladies and gentlemen, not to discuss the case under any circumstances or conditions, not to form an opinion in the matter until the matter is submitted to you. I think I also advised you at the outset not to read news accounts of this trial, and if I failed to so advise you or admonish you, I may at this time indicate to you that you should not read any news accounts, current accounts of the reporting of the trial. We will adjourn then until tomorrow at two o'clock.

(Whereupon an adjournment was taken until two o'clock p.m., Friday, September 19, 1952.) [219]

Afternoon Session

The Clerk: United States versus Olender on trial.

Mr. Lewis: Mr. Whiteside.

Mr. Drewes: Mr. Lewis, may I ask one further question on direct before you take over the cross-examination?

Mr. Lewis: Yes.

MELBOURNE C. WHITESIDE

called as a witness on behalf of the Government, resumed the stand, previously sworn.

Further Redirect Examination

By Mr. Drewes:

Q. Mr. Whiteside, I show you the Government Exhibit No. 45 which has heretofore been admitted into evidence and ask you to state, if you can, who made the photostatic copy of the original document that represents?

A. Well, after Mr. Ringo gave me the originals, I took them to our photostat room and had the operator make them.

Q. You were there at the time, is that correct?

A. That's correct.

Mr. Drewes: That is all.

(Testimony of Melbourne C. Whiteside.)

Recross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, did you have the opportunity of securing the file Asturias stock from the Securities Division? A. Yes, I did.

Q. Have you that with you? [220]

A. I have a copy of the report, yes, sir.

Q. This is the report of the Securities Division, the Internal Revenue agent's office?

A. That is what it is purported to be, yes, sir.

Q. Well, is it?

A. As far as I know it is. I obtained it from the Internal Revenue agent's office.

Mr. Lewis: Your Honor, I would like to read part of this report into the record.

“The stock and stockholders’——”

Mr. Drewes: Object, your Honor, to reading the document unless it is put into evidence.

Mr. Lewis: I am going to put it into evidence.

The Court: Well, you better make your offer. Is it, the reading, very extensive?

Mr. Lewis: No, just one paragraph.

The Court: All right.

Mr. Lewis: (Reading):

“San Francisco 5, California, October 19, 1951. Stock and stockholders' loans are deemed to have become worthless in the year 1947, according to the attached copy of the information report dated November the 28th, 1950, prepared by M. E. Seaback, Internal Revenue agent.”

(Testimony of Melbourne C. Whiteside.)

Your Honor, I would like to introduce this into evidence [221] as Defendant's Exhibit 1.

Mr. Drewes: No objection.

The Court: It may be introduced and marked in evidence.

The Clerk: Defendant's Exhibit A in evidence.

(Thereupon the document hereinabove referred to was introduced and marked Defendant's Exhibit A in evidence.)

Q. (By Mr. Lewis): Now, Mr. Whiteside, you spent considerable time in 1948 and '9, I think you said, probably '50, investigating the affairs of the Defendant, Milton Olender. Did you find any evidence of any other business activity the defendant was engaged in other than the operation of the Army and Navy stores during the years '45 and '46?

A. He was a member of some partnerships in which some property was involved—Fresno property.

Q. Was he engaged in any business activity which was not reported on his income tax returns?

A. He sold sailor suits which were not reported on his income tax return.

Q. Did you find any others, outside of those that have been admitted into evidence here, that were not reported?

A. We had some other suspected sales we were not able to——

Mr. Lewis: I move that be stricken out, your Honor. It is not responsive.

(Testimony of Melbourne C. Whiteside.)

The Court: Yes.

Mr. Lewis: "Suspected." [222]

The Court: That may go out.

A. None that we could definitely prove.

Q. (By Mr. Lewis): None that you could prove at all? A. That we could definitely prove.

Q. Except those of the business activities that were reported on the returns?

A. With the exception of the ones that are in evidence.

Mr. Lewis: That is all.

Further Redirect Examination

By Mr. Drewes:

Q. You testified, Mr. Whiteside, that Mr. Olender was engaged in partnership activity in connection with the operation of the Riverdale Ranch in Fresno? A. That is correct.

Q. That ranch was sold, was it not?

A. That is correct, it was sold in 1946, I believe.

Q. The partnership return reflects that sale, do you recall?

Mr. Lewis: I object, your Honor, the return is in evidence.

Mr. Drewes: Withdraw the question.

Q. Did the sale of that property result in capital gain to the partnership; state if you know?

A. Yes, it did.

Q. And was that gain reported by the taxpayer in the year 1946? A. It was not. [223]

(Testimony of Melbourne C. Whiteside.)

Mr. Lewis: I object, your Honor. The return is in evidence and it will show itself whether or not that gain was reported.

The Court: You might refer to the return—you might refer the return to the witness.

Mr. Drewes: I will withdraw the question.

Q. I will show you the Government Exhibits Nos. 2 and 4 which are the individual income tax returns for the year 1946, heretofore marked in evidence, the individual returns being those of Mr. Olender and his wife, Betty Olender, and ask you if the capital gain realized from the sale of the Riverdale Ranch appears on either of those returns? A. No, sir, it does not.

Mr. Drewes: That is all, Mr. Whiteside.

Mr. Lewis: What is the partnership return?

Mr. Shelton: I think it No. 10, Mr. Lewis.

Further Recross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, I am showing you Government's Exhibit No. 20, partnership return of Olender, Hamilton, Kaplan and Gambor. Does it show the sale of the Riverdale Ranch?

A. No, sir, this does not show the sale.

Q. Does it not show the sale of the Riverdale Ranch?

A. It shows a business loss from the operation.

Q. Loss on sale—what is that—Riverdale [224] Ranch—

(Testimony of Melbourne C. Whiteside.)

A. That is under an expense item in the return.

Q. Well, it is reported in the return, though, isn't it?

A. It doesn't say it is a loss on the sale of the ranch. I would like to see a computation of that \$84.22.

The Court: Pardon me. What does it say on the report? Will you read it, please?

A. Under "Riverdale Ranch" there are two columns, one "Income" and one "Expense." They have one expense item, "LG.frv., \$30," and then, "Loss on sale, \$84.22." I *don't* if that is the sale of the ranch or sale of some equipment on the ranch. The sale on the—the gain on the sale of the ranch was a considerable amount in excess of that. It was no loss.

Q. (By Mr. Lewis): Wasn't that changed by your computation which we agreed was correct, was changed by going back and not taking the original cost of the ranch but taking it upon the death of the party, which is a correct way, I admit, legally—the valuation at the date of death?

A. I do not recall how this \$84.22 was computed.

Q. I am not asking you about that. But I say, isn't the cost—isn't it possible the cost changed—

A. That is correct.

Q. —would be because of the changes that we agreed to in conference?

A. As I recall, you agreed to the income or the profit, as [225] we determined it. Now, what the differences were, I don't recall at this time.

(Testimony of Melbourne C. Whiteside.)

Q. You don't recall now?

A. I recall it was something in connection with the basis of the property, but not the exact figures.

Mr. Lewis: That is all.

Mr. Drewes: No further questions.

The Court: Witness excused.

(Witness excused.)

HUBERT C. MYTINGER

called as a witness on behalf of the government, sworn.

The Clerk: Please state your name, your address and your official capacity to the Court and to the Jury.

The Witness: My name is Hubert C. Mytinger—spelled M-y-t-i-n-g-e-r. My address would be 100 McAllister Street, San Francisco. I am employed as technical advisor, office of the Regional Counsel, Penal Division, Bureau of Internal Revenue, at that address.

Direct Examination

By Mr. Drewes:

Q. Mr. Mytinger, what is your present employment?

A. Technical advisor, Office of the Regional Counsel, Penal Division.

Q. And as such, what is the nature of your duties?

A. I review the reports submitted by the agents

(Testimony of Hubert C. Mytinger.)

on income [226] tax cases where prosecution is recommended, assist the attorneys in preparation of cases from a technical standpoint, and assist in trials such as this.

Q. How long have you been so employed, Mr. Mytinger? A. A little over six years.

Q. Were you employed by the Government prior to your present employment? A. I was.

Q. And in what capacity?

A. I served as a revenue agent for approximately eleven years.

Q. Are you a certified public accountant?

A. I am.

Q. And in what state are you so licensed?

A. California.

Q. You have already indicated you have testified in trials of this nature before?

A. I have.

Q. And in what courts have you so testified, Mr. Mytinger?

A. The Federal District Courts, San Francisco and Sacramento.

Q. And can you state to the best of your recollection approximately the number of cases in which you have taken part?

A. I would say close to a dozen.

Q. Now, Mr. Mytinger, you have been in constant attendance at the trial of this case, have you not? [227] A. I have.

Q. Have you heard all of the testimony?

A. I have.

(Testimony of Hubert C. Mytinger.)

Q. And you have examined all of the exhibits which have been introduced into evidence?

A. I have.

Q. Now, pursuant to my request have you prepared computations of net worth and income in this case?

A. I have.

Q. Will you let me have your computations, please?

A. (Witness producing.)

Mr. Drewes: May the record show, your Honor, that I am furnishing counsel for the defense with a copy of the computations, and I have one for the use of the Court? I hand it to the Clerk, if the Court so desires. And I have also prepared a number for the convenience of the Jury, your Honor, which I should like to give to the jurors at this time.

(Handing to a juror.) Would you be kind enough to pass them down and keep one for yourself?

Each of the jurors have a copy?

Q. Now, Mr. Mytinger, the computations which you hand me are based entirely on evidence admitted in the case?

Mr. Lewis: Your Honor, just a moment. I want to make an objection here to the accuracy of the net worth statement that they are giving to the Jury under "Non-deductible [228] expenditures." They include, "Gray Shop" for \$1,391.01. I believe the evidence shows that the lady testified as follows:

"Q. There are certain payments indicated here which are totaled at the sum of \$1,309.11. They are indicated as being cash payments by this ledger

(Testimony of Hubert C. Mytinger.)

sheet. You can't tell from that indication whether or not that was a cash payment or a payment by check, can you?

"A. Well, no, because whenever the bookkeeper makes a transaction there it is always posted as check. However, we may have records from way back to where we can indicate whether it is cash or check.

"Q. But you can't tell from this record?

"A. Not on the ledger, no, sir."

Mr. Drewes: What is your objection again?

Mr. Lewis: My objection to it is that under Stipulation five that it is not provided for as one of the uncontested items, and no proof was made that there was any cash payments to the Gray Shop in the year 1946.

Mr. Drewes: You are relying on a point of the stipulation, are you, Mr. Lewis?

Mr. Lewis: Yes.

Mr. Drewes: What page? [229]

Mr. Lewis: On page 4 of the stipulation:

"These figures include Federal income taxes paid, but exclude all items appearing in the preceding paragraphs of the stipulation and do not include the following items of alleged expenditure during the year 1946,"

and under "Cash payments, Gray Shop (year 1946), \$1,357.08," is covered and now they come in with this \$1,391.01, when the woman testified that she couldn't tell whether it was cash or not.

Mr. Drewes: The basis of your objection is that

(Testimony of Hubert C. Mytinger.)

in the list of the items we have excluded from the stipulation we group this under a title, "Cash payments," and we can't prove that is cash because some of it might have been paid by check.

Mr. Lewis: The stipulation provides for cash payments and we also enumerate in the stipulation personal checks that we didn't recognize as non-deductible expenditures, and they are itemized separately there. They did not prove any cash payment.

Mr. Hagerty: Then there is the further objection, too, your Honor, that the evidence on this ledger sheet shows——

The Court: Let us take up the items as we go along. I will meet that as we go along.

You prepared this?

A. Yes, I did. [230]

The Court: I think that we had better take up the Net Worth Statement and if you have any objection, you can object to that item when we approach it. I will have the arguments in mind. You might examine this witness on the Net Worth Statement.

Mr. Drewes: If your Honor please, do you have the stipulation before you, your Honor?

Mr. Lewis: Your Honor——

Mr. Drewes: Do you have this stipulation, your Honor? There is nothing to examine this witness on. The objection made by counsel is a highly technical one. This particular item is under the third section of the last section which is excluded items,

(Testimony of Hubert C. Mytinger.)

and for purposes of convenience this particular item is listed under a caption which is entitled, "Cash Payments," and the objection is interposed on the flimsy ground that some of the payments were by check, and we don't know which is by check and which is by cash. I will submit it, your Honor.

The Court: The stipulation shows \$1,357.08.

Mr. Drewes: Yes.

The Court: And the net worth statement prepared by this gentleman demonstrates \$1,391.01.

Mr. Drewes: That is not the basis of the objection, as I understand it, your Honor. The basis of the objection is that the ledger sheet shows that the amounts were received but it doesn't appear they were cash, that it might have been by [231] check.

The Court: I will overrule the objection.

Mr. Drewes: Take exception, your Honor.

The Court: All right.

Mr. Lewis: Now, your Honor, I would like to make the objection to the entire basis—the net worth basis of proving this case, on these grounds: Courts have held in the net worth cases that the Government has to offer proof that there was outside income not reported on the taxpayers' books, or that he did not keep books showing a profitable source of income to the taxpayer.

Mr. Drewes: Shouldn't this motion be made at a later time in the proceedings, your Honor? The Government hasn't rested.

The Court: I think probably so. I will reserve

(Testimony of Hubert C. Mytinger.)

the hearing of the motion. I think I have in mind what you are approaching, counsel.

Mr. Hagerty: It is our position, your Honor, that evidence on a net worth basis should not be deemed to be brought in until the corpus delicti is established.

The Court: Let us first, counsel, look objectively at this net worth statement.

I wish you would tell the Jury, mindful this is probably the first time some of these jurors have heard a net worth statement—at least thus far we have only had a few allusions [232] to net worth—have this witness tell the Jury and the Court the processes of leading up to a final drafting of a net worth statement, how he approached it in generality.

You have a stipulation here as to the sum of the subject matter.

Mr. Drewes: Yes, your Honor.

The Court: But have the witness tell the Jury something about a net worth statement and how it was prepared. Will you do that, please?

A. Sure.

The Court: In a general way.

A. A net worth statement as such would mean the value of a man's assets after allowing for his debts. The net worth statement, as it is used in this type of case, does not reflect the true value of the assets, but it reflects the amount that he has invested in those assets. It does, of course, reflect the amount that he owes on all liabilities, and subtract-

(Testimony of Hubert C. Mytinger.)

ing the liabilities from the total investment in the assets gives what we call net worth. It more truly could be termed as net investment remaining at the end of the year.

Q. (By Mr. Drewes): In this particular computation which you made, which you have made, upon what evidence did you rely, Mr. Mytinger?

A. The evidence relied upon with respect to a very few items is contained in the stipulation, Government Exhibit 15. Those exceptions are the Asturias stock or investments. Exhibits 14 [233] and 15 are relied upon, and the testimony of two, I believe, witnesses, at the trial, and with respect to the cash in safe deposit box, Government Exhibits 25 and 45, are relied upon, together somewhat with—pardon me one moment while I locate it here——

Mr. Lewis: Mr. Mytinger, would you talk just a little bit louder?

A. Yes. Coupled with Exhibit 24, the net worth statement of the defendant. Now, as to the expenditures on the second sheet of the tabulation as noted there, the nondeductible expenditures, one item appears under each year which does appear in this stipulation; two items appear under 1946, namely, I. Magnin and Gray Shop, which are supported by the evidence and testimony separately.

Mr. Lewis: Object to stating, "supported by evidence." That point is still before the Court as to whether the nondeductible expenditures in the Gray Shop were supported by any evidence.

(Testimony of Hubert C. Mytinger.)

The Court: Overruled.

Q. (By Mr. Drewes): It is based on an exhibit in evidence? A. That's correct.

Mr. Lewis: Take exception.

The Court: Overruled.

A. Likewise the non-taxable portion of the capital gain appearing on the second sheet is in the stipulation. [234]

Q. (By Mr. Drewes): So just to recapitulate, your computations are based, for the most part on the stipulation. However, you have also——

A. That's right.

Q. ——included the Asturias items, the cash involved, and then with respect to nondeductible expenditures, the exhibits which have been introduced covering I. Magnin Company, the Gray Shop?

A. That is right.

Q. Now, Mr. Mytinger, according to your computations, what were the total efforts of the defendant and his wife as of the last day of 1944, 1945 and '46?

A. As of December 31, 1944, \$196,002.07; as of December 31, 1945, \$265,113.29; as of December 31, 1946, \$323,395.29.

Q. And now will you state what the liabilities of the defendant and his wife were as of the same date?

A. As of December 31, 1944, \$5,000.00 even. The same amount at the end of December in 1945. As of December 31, 1946, \$40,201.67.

Q. Now, would you state, according to your com-

(Testimony of Hubert C. Mytinger.)

putation, the net worth of the defendant and his wife as of the same dates?

A. As of December 31, 1944, \$191,002.07; as of December 31, 1945, \$260,113.29; as of December 31, 1946, \$283,193.62.

Q. Now, will you state by what amount the net worth of the defendant and his wife increased in the years 1945 and 1946? [235]

A. In 1945 the net worth increased \$69,111.22. In 1946 the net worth increase was \$23,080.33.

Q. And now, according to your computation, what was the total amount of nondeductible expenditures not included in the net worth computation for the years 1945 and 1946?

A. 1945, \$19,081.32. In 1946, \$26,240.37. I might say that total does not appear on that typed sheet. It is the total of three items.

The Court: Would you explain to the jurors what you mean by nondeductible expenditures?

A. Yes. Those are expenditures for living expenses, Federal income taxes, other current expenditures of a nondeductible nature. They do not include investments which are otherwise set forth under the caption, "Net Worth Items."

Q. (By Mr. Drewes): And now, Mr. Mytinger, according to your computations, what was the amount of nontaxable capital gains of the defendant and his wife for the two years 1945 and 1946?

A. 1945 it amounted to \$139.77. In 1946 it amounted to \$464.47.

Q. According to your computations, assuming

(Testimony of Hubert C. Mytinger.)

that net worth income is represented by the increase in net worth plus unallowable expenditures, less non-taxable income each year, what would be the total net income of the defendant and his wife in 1945 and 1946?

A. For 1945 it would be \$88,052.77. For 1946 it would be [236] \$48,856.23.

Mr. Drewes: I will pause to put those on the board.

Q. For the year 1945, Mr. Mytinger, the figure is \$88,052.77, is that correct?

A. That's correct.

Q. And for the year 1946, \$48,856.23?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. Now, according to your computations, Mr. Mytinger, what was the total amount of net income unreported by the defendant and his wife for the two years? A. 1945, \$46,985.16.

Q. And for the year 1946? A. \$25,341.61.

Q. And will you state from your calculations the reported income by the defendant and his wife for the years 1945 and 1946?

A. For 1945 the returns show that they reported \$41,067.61.

Q. And for the year 1946?

A. For the year 1946 the returns showed a reported \$23,514.62. [237]

Q. Mr. Mytinger, assuming that the unreported income to which you have just testified is taxable one-half to each spouse on his separate return, and

(Testimony of Hubert C. Mytinger.)

assuming further that income as best corrected includes taxable long term capital gain as follows:

In 1945, \$139.77, and in 1946, \$464.47, and assuming further that each spouse is entitled to exemptions as claimed on the returns which were filed by them in 1945 and 1946 what is the corrected amount of net income for the year 1945 for Milton H. Olender? A. \$44,588.96.

Q. And what is the corrected amount of net income for the year 1945 for Mrs. Olender?

A. \$43,463.81.

Q. What is the correct taxable liability for the year 1945 for Milton H. Olender?

A. \$23,523.67.

Q. And for Mrs. Olender for that year?

A. \$23,058.57.

Q. And what would be the total tax liability for the year 1945, Mr. Mytinger? A. \$46,582.24.

Q. \$46,582.24? A. That is correct.

Q. What is the corrected amount of the net income for the [238] year 1946 for Milton H. Olender? A. \$25,185.62.

Q. And for Mrs. Olender? A. \$23,670.61.

Q. State, if you will, the correct tax liability for the year 1946 for Mr. Olender? A. \$9,171.99.

Q. And for Mrs. Olender? A. \$8,322.83.

Q. And will you give me the total, please, for the year 1946? A. \$17,494.82.

Q. \$17,494.82? A. That is correct.

Q. What is the amount of unreported tax liability for the year 1946 for Milton Olender?

(Testimony of Hubert C. Mytinger.)

A. For the year 1946, \$6,117.14.

Q. And what is the unreported tax liability for the year 1946 for Mrs. Olender? A. \$5,814.89.

Q. May I have the total unreported tax liability for 1946? A. \$11,932.03.

Q. \$11,932.03? A. That is correct. [239]

Q. And what was the reported tax in 1946?

A. 1946 they reported a tax liability of \$5,562.79.

Q. And what was the reported tax liability for both Mr. and Mrs. Olender for the year 1945?

A. In 1945 they reported a total tax liability of \$15,495.75.

Q. \$15,495.75? A. That is correct.

Q. And what was the unreported tax?

A. The total unreported tax liability for 1945 is \$31,086.49.

Q. \$31,086.49? A. That is right.

Q. Mr. Mytinger, have you examined the returns filed by the defendant and his wife for the years 1942, '43 and '44?

Mr. Lewis: I object, your Honor. There is no foundation for that question.

Mr. Drewes: This again refers——

The Court: Overruled.

Mr. Lewis: Exception.

The Witness: I have.

Q. (By Mr. Drewes): Will you state the aggregate amount of net income reported on those returns?

A. In arriving at this aggregate I would like to explain one assumption or calculation I had to

(Testimony of Hubert C. Mytinger.)

make on the 1944 return filed by the defendant's wife.

Q. Please do. [240]

Mr. Hagerty: Object to that, your Honor, as not being responsive to any pending question and move to strike. It is a voluntary statement by the witness.

The Court: Overruled. You may explain.

A. The last sheet of that return, the one on which the deductions would appear is not attached to the return. There is a schedule attached to the return of the husband, Exhibit 9, which shows that she was to claim a total deduction of \$538.50. I find that by subtracting that amount, \$538.50 from the income shown on the face of her return, \$18,263.86, I arrive at a net income which apparently would be shown on the third sheet of her return of \$17,725.36. I further find that by allowing the same exemptions as she claimed on her 1945 return, the next nearest comparable year, I would have the resulting tax liability of \$6,329.45 also shown on the first sheet of her return. So I assume that this filing of net income was the \$17,725.36 which has been reported on her 1944 return.

Q. With that assumption what is the total figure?

A. Using that figure and the net income as otherwise shown on the other returns in evidence for 1942, '43 and '44 there is an aggregate net income reported of \$89,431.60.

Q. Mr. Mytinger, have you examined the as-

(Testimony of Hubert C. Mytinger.)

assessment certificates which were prepared by the Collector of Internal Revenue and are in evidence as the Government's Exhibits 21, [241] 22, and 23?

A. I have.

Q. State if you will the aggregate amount of taxes paid by the defendant and his wife as reflected by those exhibits for the years 1942, '43 and '44?

A. I find a total income tax was paid during 1942, 1943 and 1944 amounting to \$16,871.07.

Mr. Drewes: No further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, could you make the computation for the year 1946 for us taking out the non-deductible expenditure covered by the Gray Shop in the sum of \$1,309.11?

A. You say could I, Mr. Lewis?

Q. Yes.

A. Yes, I could. It would take a little time, but it could be done.

Mr. Drewes: Are you asking him to do that, Mr. Lewis? If your Honor please, I fail to see the purpose in this list of adjustments and cancellations. The matter was argued and I understood your Honor to rule. At least, at this stage of the trial the Gray Shop evidence is in the record duly admitted and stands for all purposes.

The Court: Where is the exhibit on the Gray Shop?

(Testimony of Hubert C. Mytinger.)

Mr. Drewes: As I understand the objection, your Honor, counsel does not object that those payments were not made. [242] The objection is based on the grounds that the record doesn't show that the payments were made by cash or check, and by virtue of the facts in our stipulation, in excluding that from the stipulation we, for purposes of convenience, simply listed it with other items under a caption, "Cash payments." Therefore, the matter is not adducible in evidence.

Mr. Hagerty: There was an additional objection.

Mr. Drewes: No objection was made at the time it went into evidence, I might say.

Mr. Hagerty: There is the additional point, your Honor, that this account was used by a daughter.

Mr. Drewes: The record doesn't so show.

Mr. Hagerty: It certainly does, and I brought it out in cross-examination. The girl that testified here, Mrs. Micheli, couldn't tell who made the payments, but the ledger sheet itself says, and she read it, the top notation in red ink up in the right-hand part of the ledger, that the daughter was entitled to come in and charge and she did make payments on account.

Mr. Drewes: That is a matter of defense, your Honor. The fact that she could doesn't establish that she did. That was introduced as part of the Government's case in chief. If there is any question as to who made the charges let the defense prove it at the proper time. [243]

(Testimony of Hubert C. Mytinger.)

Mr. Hagerty: That becomes a matter of credibility for the jury in assumptions of this sort. He is assuming it is the fact. It is for the jury to determine whether it is the fact.

The Court: The account shows total payments in the amount of \$1,309.01 and that is the record before the court. Accordingly, I will overrule the objection.

Mr. Lewis: Exception, your Honor.

Q. (By Mr. Lewis): Mr. Mytinger, in working out your net worth for the purpose of your figures I notice that you used cash in safe deposit box as of December 31st, 1944, \$50,000, and the sum of \$7,200 cash as of December 31st, 1945. You did not then take into consideration in these figures the cash figures as shown in Mr. Friedman's affidavit, did you?

Mr. Drewes: Objected to. There is no such affidavit in evidence, your Honor.

The Court: Did you make reference to any such affidavit?

The Witness: No, your Honor.

Q. (By Mr. Lewis): In the list of savings, not savings bonds, but your treasury bonds for the year 1945 you used a total of \$82,000. Included in that sum of \$82,000 was the \$20,000 worth of bonds that the witness has testified to as "mother's bonds"? Do you remember the testimony of Mr. Ringo? [244]

A. I remember Mr. Ringo explaining an entry made, I believe, on an inventory that he took with

(Testimony of Hubert C. Mytinger.)

notation, "Bonds belong to mother," or something like that.

Q. Yes, but those bonds are included in the \$82,000 figure that you used here, that \$20,000?

A. That is correct.

Mr. Lewis: I think that is all, your Honor. Your Honor, I might request that Mr. Mytinger remain in the courtroom. After we present our case I may want him to make another computation.

The Court: All right.

Mr. Drewes: I have no further questions at this time.

Mr. Lewis: No further questions.

Mr. Drewes: If your Honor please, the record in this case would show that the United States subpoenaed one George Goodman of Miami Beach, Florida, to appear to testify and produce documents. I have before me a letter from a physician of Miami Beach, Florida, one Jessie O. Halpern, in which he states that—

Mr. Hagerty: I will object to this going in before the jury as a hearsay statement.

Mr. Drewes: I ask that it be made a part of the record in this case.

Mr. Hagerty: Object to its introduction, your Honor.

The Court: May I see it? I will discuss this with [245] counsel at the recess, that is, the letter from the doctor. Are there any other items that you desire to examine this witness on?

Mr. Drewes: No, your Honor.

(Testimony of Hubert C. Mytinger.)

The Court: Will you explain to the Jury the item of the Asturias stock in the amount of \$10,000? If, as the report shows, the corporation proved to be defunct and the stock valueless, upon what basis or theory do you set it up as having a value in 1946?

The Witness: It is my understanding the only evidence thus far before the Court as to its worthlessness is as of December 31st, 1947. For income tax purposes each year has to stand by itself, hence the value at the end of 1946 representing the amount invested in this stock or as a loan would still be charged as part of the defendant's net worth at the end of 1946.

The Court: You made a distinction, at the outset of your testimony, between net worth and expenditures of a capital nature, did you not, wherein you stated that if the stock had no value in 1946, and if it appeared that this gentleman invested \$10,000 in the company, Asturias Company, notwithstanding, would you set it up in the net worth?

The Witness: No, I would say if it had no value, your Honor, and if it were included in his net worth statement representing an investment it would then be allowed [246] below as a loss on worthless stock. However, I believe if you will refer to the corporate records you will find some of this stock was issued as late as the middle of the year 1947, and the last investment, it is my recollection and will be supported by the corporate record, the last investment occurred well towards the end of the year 1946 indicating to me that at that date at least

(Testimony of Hubert C. Mytinger.)

there is no present question or evidence as to its worthlessness at the end of 1946.

The Court: Have the jurors any questions? If you wish to address any questions concerning this net worth statement to this witness you may do so through the Court. Any explanatory matters that you may desire. If not, we will take the afternoon recess now for a short period of time with the same admonition to you.

Mr. Drewes: If your Honor please, the United States will rest at this time.

The Court: All right, I will hear counsel on a couple of matters. Same admonition, ladies and gentlemen. You may retire.

(The following proceedings were had in the absence of the jury):

The Court: The Government rests?

Mr. Drewes: The Government rests.

The Court: With respect to this letter, counsel for the Government received it from Jessie O. Halpern, 350 Lincoln [247] Road, Miami Beach, Florida, written in connection with Mr. George Goodman. George Goodman, I assume, is a material witness?

Mr. Drewes: Yes, your Honor. You will recall that the Goodman transactions in 1944 were referred to many, many times and have been. It was our purpose to produce him to testify to those transactions, although they were in a year preceding the prosecution years, they were to be offered on the basis, of course, of showing a scheme, design and

pattern. I regret that the letter which your Honor has before you was not in affidavit form, but, of course, we have no control over those things, your Honor. That was the response received and time did not permit any further steps to be taken.

The Court: When did you first make a determination, or cause a determination to be made as to whether this witness would be available?

Mr. Drewes: My recollection is that he was subpoenaed on the 10th of September, your Honor.

The Court: You had no prior knowledge of any illness?

Mr. Drewes: None, sir.

The Court: He states he is suffering with chronic asthma and at the present time is experiencing an attack of asthmatic bronchitis precipitated by a virus infection. For the past several months he has required many injections of adrenalin frequently given in emergency at Mount Sinai [248] Hospital. For these reasons he has been advised not to subject himself to physical exertion, emotional stress and strain, or change in climate. Is the Government willing to accept this letter in the record?

Mr. Drewes: We are, your Honor.

The Court: It may be lodged in the record, then. Now, you had some matter, Mr. Lewis, that you were about to take up with me on net worth?

Mr. Lewis: Yes, your Honor. As you will remember, I objected to any evidence going in on the net worth method for the reason that in all the deciding cases that I have been able to find on net worth and expenditures method, the Government

proved independently an affirmative evidence, the receipt of unreported income from the specific transaction or specific source of income. Such cases as black market overpayments, the party did not have a full and complete set of books; that he had some business which he did not report on his return and outside source of income was proven, or else they proved income in that particular business.

In this case they have not proven any profit from any transaction that was not in the books. They have also introduced evidence, and I want to renew my motion or objection to the evidence of Charles Ringo, and all the documents, communications from the defendant that went into the record on the grounds of privilege; that the attorney [249] cannot waive the privilege, that only the clients can waive the privilege, and the Government would not have any case at all here even to go to the jury if it was not for the evidence acquired from Mr. Ringo who is the attorney for the defendant, and I think that that evidence should be stricken from the record at the present time and that a motion of acquittal should be granted because the Government has not proved a net worth case in the manner prescribed by the cases of *U. S. vs. Chaplin*, *Scheueran vs. U. S.*, *U. S. vs. Skidmore*, *U. S. vs. Johnson*, *U. S. vs. Potsen* and *Gluckman vs. United States*, all of which cases were based upon the idea that a party was engaged in some business wherein he received an outside source of net income which is not shown in this case in any manner whatsoever.

Mr. Drewes: If your Honor please, the record is

replete with testimony to the effect that the taxpayer's books were not complete, and thus amply justifies the use of a net worth approach at this particular trial. Your Honor will doubtless recall the testimony of the witness Ringo.

At page 68 of the record the following appears, questions asked by myself and responses by Ringo:

“Q. Why did you ask him to bring net worth figures for each year?

“A. In order to reconcile his income with his net worth. [250]

“Q. Why did you make an audit—strike that. I take it that you did not make an audit of his books and records?

“A. No, I did not make an audit of his books and records.

“Q. Will you explain why you did not?

“A. Well, in a great many of these transactions they were purely cash transactions by use of currency and so forth, and it would have been impossible to really verify figures.”

That is testimony in part only of the witness Ringo.

The witness Blanchard, your Honor, you will recall, testified that he first questioned—that when he first questioned the defendant he was engaged in another inquiry and he found in connection with that inquiry that certain transactions in the year 1944, so-called Goodman transactions, were not on the books either. That testimony went into the record without any objection.

The Court: Counsel, at one stage of the case, I

believe Mr. Lewis, stated some theory on wash sales. What was your theory on wash sales? Did you have a theory on that?

Mr. Lewis: Yes, your Honor.

The Court: Pardon me, counsel, I didn't intend to interrupt you. Have you completed your thought?

Mr. Drewes: Well, there is other evidence, your Honor. [251] The agents have testified that the Lerman transactions which were negotiated by Leavy were in the books in the form of a capital investment rather than as a purchase and sale as would ordinarily be the case, and there is further evidence with respect to the Saraga transactions.

Mr. Leavy testified that he took funds east to Mr. Saraga, Saraga in turn after several transactions sent the money back to the taxpayer and that money went into his personal account, not into the account of the Army-Navy Store. So there is ample evidence in the record that the taxpayer's books are not complete.

The Court: Went into the capital investment account?

Mr. Drewes: One did. There were two. The Saraga transaction went into the personal account of the taxpayer.

The Court: What was the Saraga transaction as to amount?

Mr. Drewes: \$7,000, roughly. Mr. Leavy testified he took between six and seven thousand dollars back, and Mr. Saraga produced his books and there were lots of transactions, but as the record shows now a check in the amount of approximately \$7,700

was returned by Mr. Saraga to the taxpayer because he could not make delivery on the suits, and the greater part of that sum went into the personal account of the taxpayer rather than into the books of account of the Army-Navy Store. So all that testimony, your Honor, is to the effect [252] that the books were not complete. An audit would be absolutely unproductive and amply justifies the use of a net worth approach.

With respect to the privilege of Mr. Ringo, I think the entire record shows that he was employed as an accountant.

The Court: There isn't any question in my mind as to the propriety of my ruling on that score. Only very recently I briefed that very carefully and handed down a ruling in connection with the Chin Lim Mow case which was recently tried in this Court and the problem in the Chin Lim Mow case was perhaps a little more serious than the problem in the case at bar because in the instant case there is no evidence at all that the gentleman, Mr. Ringo, at any time functioned as a lawyer, or in fact the defendant employed him as a lawyer. He was employed as an accountant solely and simply.

Mr. Drewes: He so stated.

The Court: The fact that his business card may have included thereon, "attorney-at-law" or "counsellor" as it may appear would not be any criteria in the determination of his role or the role that he played, or his relationship with the accused in the case at bar. Therefore, I overruled the objection and I think with propriety.

Mr. Hagerty: Your Honor didn't permit us to put the defendant on to show the transactions, how he happened to retain Mr. Ringo. [253]

The Court: I couldn't consider that as proper. I make my rule in the light of the evidence as it unfolds.

Mr. Hagerty: I asked on the voir dire examination of Mr. Ringo that we be permitted to let the defendant take the stand for that limited purpose, to show what he retained Mr. Ringo for.

Mr. Drewes: Wouldn't the solution still be on what was done, not what was said or intended by the defendant? I assume what the defendant said would be as favorable as possible.

Mr. Hagerty: In the course of our case we will amplify on that.

The Court: On the subject of the propriety of the net worth theory, in the light of the record before the Court I think that this is a case that comes within the net worth and expenditures theory. It should be explained to the Jury, however, counsel, as you progress at some stage that the net worth theory is a substantial picture, that it does not purport to be a strictly accurate picture of the man's condition. That has not thus far been done.

Mr. Lewis: Your Honor, in order to clarify these matters, I believe it would probably be in the interests of expediting the case, we have certain instructions ready, and I assume that Mr. Drewes has some, we should have a conference Monday

morning to see how many of the instructions [254] we can agree on.

Mr. Drewes: My instructions are being prepared even now.

The Court: What does the rule say about instructions, gentlemen?

Mr. Drewes: Unfortunately I don't know.

The Court: The rule of course states that the instructions must be handed in at the start of the case. I know of judges presiding in these courts who might crack your knuckles at this juncture and even suggesting instructions.

Mr. Lewis: The reason I brought that up is that Judge Roche requested us to do just what I was suggesting now.

The Court: Well, I realize the burdens on Government counsel as well as the defense counsel. I have no objection to the instructions coming in at a late period. The reason that the instructions should be offered at the start of the trial is to give the Court an opportunity to assimilate the theory of the case in the light of the instructions.

There are no unusual principles of law applicable in this case, as I see it. I think it is the routine net worth case unless there be something unusual, and that is the reason the rule provides that the Court should have the instructions. The Court is not only trying one case. Very often, as you gentlemen know, there are many phases of his life occupied in chambers. It is not an easy routine affair and otherwise the rule wouldn't be on the books. I will [255] receive the instructions when

you have them ready, but I would like to have them in as early as you can get them.

Mr. Lewis: They will be ready Monday, your Honor.

Mr. Drewes: Ours also, your Honor.

The Court: Then I will assimilate the instructions and go over them, and at a later date indicate to counsel on both sides the instructions I propose to give. At that time you can make such suggestions as you have. I treat it informally, but I give counsel ample opportunity to indicate to the Court.

What happened in this Sloane account? I see a liability account of \$24,701.00. Did this gentleman buy that furniture in one year? Is that all in one year?

Mr. Lewis: Your Honor, he made a deposit and he evidently purchased—the deposit was a down payment, but he wasn't ready to move into his home so it shows a liability account, because it was on the books at Sloane's as a liability at that time and they have included it in the furniture account. So it is really a wash transaction in that regard.

The Court: It appears to be a very substantial amount on account of furnishings in a short period of time.

Mr. Lewis: He bought a new house over in Oakland and refurnished it entirely, and he hasn't taken delivery of the furniture and that is why it shows as a liability account, to balance the asset account the same way. [256]

The Court: The increase in non-business bank

accounts in 1944, \$3,000, jumped to \$31,000 in 1945. How do you account for that?

Mr. Shelton: Your Honor, it is just that I suppose the business was in such a stage that he had a smaller part of his capital employed than he had had in the earlier year, perhaps less tied up in inventory or other items. He just happened to have a——

The Court: What is this matter? Pardon me, I think I understand that now. What is this other matter that is referred to rather fleetingly in terms of an affidavit or of Judge Friedman?

Mr. Lewis: Well, Judge Friedman was on a——

Mr. Drewes: Would your Honor care to see the affidavit?

The Court: I am not privileged to see the affidavit. I suppose it would not be proper for me to look at it, but references were made to it.

Mr. Lewis: Yes, your Honor. Well, we have no objection to His Honor reading the affidavit.

Mr. Drewes: I certainly have no objection for the Government.

The Court: The Jury is getting fragmentary pictures of references to it.

Mr. Hagerty: We will outline the picture in our opening statement, your Honor, to cover the whole thing. [257]

The Court: I am just trying to clarify little things that have occurred in my mind, and naturally they will occur in the jurors'.

Mr. Lewis: I think there are probably several more in the jury's mind.

The Court: 12-31-44, cash in safe deposit box, \$50,000. Then it was reduced in 1945 to \$7,200.

Mr. Lewis: That item, your Honor, was taken off of the Ringo statement, as I understand it.

The Court: That was that little memoranda sheet that I examined?

Mr. Lewis: That is right, your Honor. I think that is where they get that figure.

Mr. Drewes: And from Mr. Ringo's working papers. Would your Honor care to examine this affidavit?

The Court: I prefer not to. It hasn't been offered. I try to keep myself free in my mind. We will take a short recess, gentlemen.

(Short recess.) [258]

(The following proceedings were in the presence of the Jury.)

Mr. Lewis: Your Honor, in this matter, it is getting close to closing time and our opening statement will be quite lengthy. We propose a recess until Monday morning, when we will make our opening statement, in which we will outline all the facts, and the order of proof which we are going to prove our case, and I think the Jury would have a clearer picture in the matter if we were given the opportunity to take the transcript and run right along with it in a rebuttal testimony.

The Court: I have no objection.

Ladies and gentlemen, you heard the statement of counsel. Monday morning next counsel for the defendant intends to outline their defense. The Gov-

ernment is resting its case, and accordingly, in the order of things, the defense will present its case to you.

How much longer do you think we will be engaged?

Mr. Lewis: Oh, I think we probably will finish some time Wednesday, your Honor. Of course, I can't tell how long Mr. Drewes will cross-examine our witnesses.

The Court: This case may reach the jury, then, at the end of the week?

Mr. Drewes: I think very likely then, your Honor.

The Court: We will adjourn, ladies and gentlemen, for [259] today. The same admonitions to you not to discuss the case or form an opinion until the matter is submitted to you.

I notice the Jury has those statements.

Mr. Lewis: I wonder if they would lodge them with the clerk.

The Court: I think it would be easier on the jurors if they lodge the statements with the clerk. And on the occasions that they desire them, they will be presented to you. Otherwise you may take them home and worry about them.

I desire to talk to counsel briefly. You may retire and leave the statements with the clerk.

(Thereupon the Jury was excused.)

(Following proceedings out of the presence of the Jury:)

The Court: Now, in connection with the several motions presented to the Court, I should like to rule on the motion to strike. The motion is denied, formally, for the record, so that the clerk may have a record here.

And you made a motion to acquit, did you?

Mr. Lewis: Yes.

The Court: That motion is denied.

You have your exceptions.

Mr. Lewis: Yes.

The Court: I note that on occasion you note an exception. As a matter of law, under the rules, your exceptions are preserved intact and inviolate without noting them. However, if [260] you desire to note them, I have no objection.

Mr. Lewis: It is a habit with me from the procedure in the Tax Court. If you don't note the exception, they don't pay any attention to it. I don't want to get out of the habit.

The Court: Probably just as well. However, I have no objection if you urge them. If you don't note them, the Court reserves them under the rules for you.

Mr. Lewis: Thank you, your Honor.

The Court: Ten o'clock Monday.

(Thereupon an adjournment was taken until Monday, September 22, 1952, at 10:00 o'clock a.m.) [261]

September 22, 1952, 10:00 A.M.

The Court: Stipulated that the jurors are present, gentlemen.

Mr. Hagerty: So stipulated, your Honor.

Mr. Drewes: Yes, your Honor.

The Court: The opening statement, Mr. Hagerty?

Mr. Hagerty: Yes, your Honor.

May it please the Court, the Government counsel, and my colleagues, at this time, ladies and gentlemen, I have the right and the duty to explain to you the complete defense we have to these charges that are brought here by the Government against this defendant.

First of all, because some of you are new jurors, I want to state that I am sure it will be stipulated by the Government, otherwise we will prove it, this is not a suit for collection of taxes. There is such a suit pending in the United States Tax Court. This is solely a criminal proceeding, and it partakes of all the aspects of every criminal case, that the burden of proof is upon the Government to prove beyond all reasonable doubt the truth of every material element of the charge.

The material elements of the charge are principally two, that this defendant had unreported income and that with specific intent to so do he evaded the income tax laws. That [262] is the question here. That is the problem and the issues that are presented to you, and it is very similar to the average criminal case where there would be one of violence or one of stealth. You have the same

elements present and you as the jury must decide the facts that are actually proved here by the evidence.

We will demonstrate that the method used by the Government, that is the net worth method, although it is recognized as a good method, sometimes in arriving at certain results and estimating a man's wealth, that it is only as good as the investigation and the facts brought to bear in the first instance. In other words, if we start out with the wrong initial net worth, if our figures are in error to begin with, we can never hope to arrive at the correct result, and our whole defense will be pointed pretty much at that, that the Government's assumption in the initial net worth of this man is way off, that the defendant's original wealth was far greater than that shown by the Government.

We will show that the defendant was born here in San Francisco in 1895, I believe, that he was reared in San Francisco, went to school here, and ultimately graduated from the University of California.

Some of his early childhood was spent up in the Mother Lode country. His mother and father were in business, they had a little store, and his father sometimes made wagon trips [263] to nearby mining camps.

The defendant helped his mother from a very early age in the store and a very close bond developed between mother and son which lasted all through her life.

The family re-moved to Fresno before the de-

fendant entered the University of California, and his father there in partnership with a brother entered many business ventures. The father had a couple of stores in Fresno, had a motel, Travellers Hotel, he had the Olender Building, he had one piece of property in Los Angeles that netted him \$20,000 a year. That the Olender, Sr., and the defendant's mother lived very frugally. That over a long period of years they amassed a great deal of money.

The evidence will show that the defendant, when he was graduated from the University of California, he returned to Fresno and went to work for his father. That his father and his uncle thought, well, Milton is in his early twenties now, I assume you want him to be married, so we will give him a store.

So they gave him one of the stores they had and he began its operation. He made money.

Along about 1923 the defendant began to go with an Irish girl. The defendant is Jewish. His father was an Orthodox Jew, Hebrew. So when the defendant became rather serious with this girl the father got quite angry, because he [264] didn't want the defendant to marry outside his race. So the defendant said, "All right, I don't want any of your money." So he turned around and gave the store back and \$25,000 with it to his father and left the store, married the girl, by whom he has had children, and who is still his wife.

The defendant struck out on his own. He worked

at various jobs in Fresno and then came up to the city here, the Bay Area, for awhile.

Then the father asked him to come back. So he did return to Fresno, on the condition that he be permitted to operate his own store again and on his own basis.

As I said, the father was an Orthodox Hebrew, but he was a very shrewd business man. Milton had gone to the University and he wanted modern methods in the operation of the store. I believe they called the store the father operated the "Schlock" store. That is an expression that apparently means this, that there is no definite price on the goods in the store. A person comes in and they size him up and say—well, if they think he can buy it, they charge him \$30, and if they think he can't buy it, they charge him \$20. They start in and bargain down but never let the customer get away. Well, Milton said, "That day is gone. The way to operate a store is to price our goods and operate on a fair basis, and you will prosper that way." [265]

Well, they agreed to let Milton operate his store. Within three months he found the old disease breaking out again, so he up again and left his father. He then borrowed a little money, came up to the Bay Area and worked in various stores here and later on he had an opportunity to go into business around the 800 block on Broadway in Oakland with a cousin or some relative of some sort.

So they did go into business and they were making money again, and about this time the marriage

has lasted, his marriage, and the father is growing old, and the father is repentant of his treatment of the son. So there is a reconciliation and the father comes to Oakland, is in the home constantly with the son, and eventually advances him the money to take over this store, and the store prospers.

So he has a store at 8th and Broadway. Later on there is an opportunity to move up to 10th and Broadway, where his store is still located.

As the years go by he prospered, made more money, and they were attempting to buy the building at 10th and Broadway. We may bring in witnesses to show that. Offers were made of \$35,000 for the building but someone else just offered a little bit more and they missed the sale of the building, although he is still a tenant there.

We will also show that this store which he has in Oakland is not what you might think, a typical Army and Navy salvage [266] store, it is not that type of store at all. It is a store where only new goods are sold and furnishings for the boys in the Army and Navy. It is a new store, where new goods alone are handled.

Well, during this period of time the father repentant as he was of his early treatment of his son told him, "Now, well, I have got your money in my vault in the store at Fresno. Every year I am going to be adding \$5,000 to that."

This went on for several years. The father died. The defendant and the father were the only ones with access to this vault and to this safe in this vault, which we will show you pictures and photo-

graphs of in the store in Fresno. So after the death of the father the defendant brought up from Fresno \$75,000 in cash out of this box that was his and put it in his own safety deposit box in the bank at 12th and Broadway in Oakland, a safety deposit box that he held together with his wife, and in which he had other moneys from his businesses that he already earned. That was about 1942.

Following the father's death the son, who of course had always been very close to the mother, became even closer as her business adviser and consultant, and over the years she made gifts and loans to this defendant. There were other elements of income, sales of property and rentals that the defendant received. So before—we will say, approximately 1944, the defendant had a great deal more money in his safety [267] deposit box than we find the Government giving him credit for in their initial worth statement.

Well, in 1944 the defendant was working very hard in his store, he was under-manned, there was a great shortage of manpower everywhere. His two sons were in the service and he was running the store practically alone. In fact, he nearly broke down his health.

Along that time one of his sons was at an army camp at or near San Antonio, Texas. The defendant wanted to make a trip there to visit him. He had also learned from the son that there was probably an Army and Navy store there available. So the defendant preparing for this trip, he went to an attorney by the name of Monroe Friedman,

who had advised him in other matters, and he asked Friedman to come with him to a safety deposit box in Oakland, and he took his wife's name off the box and entered that of Monroe Friedman and gave Mr. Friedman instructions that on this trip that the defendant was going to make to Texas if it became necessary for him so to do he would wire Friedman and ask him to send him funds out of that box.

We will demonstrate through the affidavit of the present Friedman, who is now presently Judge Monroe Friedman, that there was at that time, that was about April of 1944, there was at that time in that box upwards of \$71,000 or \$75,000. We will further show that this defendant, when he had gone to [268] see Mr. Ringo, the accountant, after being quizzed by the men from the Internal Revenue, that he had totally forgotten that incident. That after this tentative net worth statement was prepared by Ringo and put into the hands of the Government, the defendant, talking with Monroe Friedman, Monroe Friedman said, "Don't you remember? You took me to the bank, and on the bank's records we entered my name on your box, and I counted the money there and you had more than that."

All of this we will demonstrate from bank records, from the affidavit of the judge. The evidence will also show that prior to this other trip and prior to the counting of the money by the Judge,ⁱ the defendant had taken therefrom \$10,000 to take with him for this proposed purchase of an Army & Navy Store in San Antonio, Texas.

And, of course, the Government by its own evidence, put in the checks of some \$20,550 made to Goodman in January of 1944, which funds came from this vault, and, of course, that was long before, several months before—January to April—several months before Judge Friedman counted the upwards of \$71,000 in the vault. We will show that the Goodman transaction was entered—there were entries pertaining to the Goodman transaction in the defendant's books and in his inventory. Probably if a more careful survey and audit had been made by the Government, they would have found those entries. [269]

But following this, the mother, who is still living in Fresno, would send funds from time to time, loan funds to the defendant, which he would use, and then we have some letters from the mother when he was about to return funds, and she would say, "No, I want you to keep the funds up there. Maybe you can invest them for me," and there were certain discussions between him and he recommended, following the advice of his banker friends, he recommended as a good investment Bank of America stock to his mother and that she said, "No," that her husband had had, in looking back upon the experiences they had during the crash, said, "No, we don't want any stocks, get Government bonds for me," and that the defendant did purchase for his mother upwards of \$20,000 or many thousands—I won't trust my memory because memories are tricky—we will have the records here. We will show what he did buy for his mother.

Those things of course had been charged against him. They were not his at the time.

We will demonstrate that there is nothing smacking of criminality in the handling of large sums of cash money. We will show that in this bank alone, where the Government introduced these records—they call them TCR's—the bank records showing handling of any sums over \$20,000 in cash—that they had scores of such transactions all the time. I believe you will even recall, and I believe His Honor [270] will instruct you, I am sure, that anything we develop from an adverse witness on cross-examination is still a part of our evidence, and you will recall the witness Harley, the man from the Bank of America, testifying that they had so many of these that they had several vice-presidents who could sign the form. So the handling of that alone is not evidence of criminal intent or concealment; that it frequently occurs; that you have to handle large sums of cash in business.

We will show that the Government has spent several years in this investigation. That in that time they have not been able to develop anything more than maybe slight bookkeeping errors, maybe mistaken accounting procedures, that are typical of every business you want to look it. One firm will do a thing one way, another time another way. We will demonstrate that by experts from the stand.

When our evidence is all in, I think that we will have established pretty well everything that I have said, and we will have established that the Gov-

ernment in its initial survey, as I have said before, failed to give the defendant credit for what he actually had. Consequently we will then show that there has been no great increase in the net worth that has not been reported, and we will show you in this case that this defendant has made his income tax returns every year—this isn't a case where he failed to report at all—he has made his returns, he made his returns to the [271] best of his ability, he has reported everything that he could, he told them about everything he knew of his business, he has never had at any time—the very crux of the case that they have to establish before they could achieve their result—he has never had at any time a specific intent to wilfully evade the tax laws of the United States. And when all of our evidence is in we will ask you to stand by your votes as jurors, and not finding that the proof is there on the part of the Government to return a speedy acquittal for this defendant.

Our first witness will be Mr. Carol, who has, as I understand, charge of the safety deposit boxes of the Bank of America, Oakland Main Branch.

CLIFFORD F. CARROLL

was called as a witness by the defendant, sworn:

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. My name is Clifford F. Carroll. I reside at 1512 28th Avenue, Oakland. I am employed as special agent in the Bank of America, the East Bay District.

(Testimony of Clifford F. Carroll.)

Direct Examination

By Mr. Hagerty:

Q. Mr. Carroll, have you brought with you some records from the Bank of America?

A. I have. [272]

Q. May I see them, please?

A. (Witness producing.)

Q. Mr. Carroll, those records that you have before you, will you identify them for His Honor and the ladies and gentlemen of the Jury?

A. This card is known as a history card, safe deposit box department of the Oakland Branch of the Bank of America, located at 12th and Broadway, Oakland. It is known as Box No. 44.

Q. And what name is that box in?

A. That box is in the name of Molly or Milton H. Olender, 1026 Broadway, Oakland.

Mr. Hagerty: Now, if your Honor please, I have a photostat of that record which I have shown to the Government counsel. That at this time I ask be introduced as defendant's next exhibit in order.

The Court: It may be marked defendant's Exhibit in evidence.

The Clerk: Defendant's Exhibit B in evidence.

(Safety deposit box No. 44 records received in evidence and marked Defendant's Exhibit B.)

Q. (By Mr. Hagerty): You have another record there of another box?

(Testimony of Clifford F. Carroll.)

A. I have another history card record of the safe deposit box known as Box No. 56 at the Oakland Branch, Bank of America, [273] 12th and Broadway, Oakland, and that box being dated 1/13/1943, in the name of Milton or Betty B. Olender, 1026 Broadway, Oakland.

Q. Those records indicate that there was ever a change in the names of the parties as tenants to that box?

A. There was. There was a change made on April 22, 1944. Title to box was changed to Milton Olender and Monroe Friedman.

Q. And Monroe Friedman? A. Correct.

Q. Are you acquainted or do you personally know Judge Monroe Friedman? A. I do.

Q. Is that the same man as indicated on that box, Judge Monroe Friedman?

A. I presume it would be.

Mr. Drewes: May the answer go out?

A. I couldn't say.

Q. (By Mr. Hagerty): You are not sure?

A. I couldn't say.

Mr. Hagerty: We will establish that by other evidence.

A. I couldn't answer.

Mr. Hagerty: Then at this time, your Honor, I offer in evidence a photostatic copy of that record which the Government counsel has.

The Court: It may be marked next in [274] order.

The Clerk: Defendant's Exhibit C in evidence.

(Testimony of Clifford F. Carroll.)

(Thereupon safe deposit box No. 56 records were received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Hagerty): Could you tell from that record, Mr. Carroll, how many times the party known as Monroe Friedman entered that box?

A. No, not from this record I cannot. I cannot tell how many times it was entered from this record.

Q. I see. There are other such records in the bank?

A. There is an entrance ticket that is signed every time anyone comes in and enters the box.

Mr. Hagerty: You may cross-examine.

Mr. Drewes: No questions.

Mr. Hagerty: Do you have something further to complete your answer?

A. The signature cards—is this necessary?

Q. I don't think——

A. I believe the subpoena called for that.

Mr. Hagerty: We have photostats of both sides, Mr. Carroll (returning document to witness.) You may step down. Any further questions?

Mr. Drewes: No further questions.

(Witness excused.) [275]

ELLA WIDRIN

called as a witness by the defendant, sworn:

The Clerk: Please state your name and your address and your occupation, if any, to the Court and to the jury.

(Testimony of Ella Widrin.)

A. Ella Widrin, 431 17th Avenue.

Q. Occupation? A. I am a housewife.

Direct Examination

By Mr. Hagerty:

Q. Mrs. Widrin, are you acquainted with the defendant who sits over here? A. I am.

Q. Milton Olender? A. Yes.

Q. Is there any relationship between you at all?

A. My brother-in-law.

Q. He is your brother-in-law? A. Yes.

Q. Now at the decease of your mother did you have any business transactions with the defendant?

A. Yes. I had around \$575 of my mother's money, and I gave it to my brother-in-law, and on many occasions she says, "You know Bessie has more than—more of my money." And I don't—but I gave him \$575—around that.

Q. Do you know for what purpose?

A. Well, to be used as her funeral expenses or any way he saw [276] fit.

Q. Well, did he take care of the funeral of your mother? A. Yes.

Q. In connection with that transaction did any agents of the Internal Revenue ever talk to you?

A. Yes.

Q. And do you know who they were?

A. Well, Mr. Whiteside and Mr. Root.

Q. Do you see Mr. Whiteside here in Court?

(Testimony of Ella Widrin.)

A. I don't recognize him. It's over two years ago when they were out.

Q. The man sitting there, do you recognize him, the second man?

A. I couldn't say. It's over two years ago.

Q. Well, will you relate to the ladies and gentlemen of the jury just what conversation you had with these agents from the Bureau of Internal Revenue at that time?

A. Well——

Mr. Drewes: Objection, your Honor. No proper foundation has been laid.

Mr. Hagerty: The question here, your Honor, goes to the transaction and the money passed to the defendant which make up a part of his net worth, and an investigation was made from every avenue or source the Government saw fit to make, and I would just like to bring out the dispute over those [277] funds.

Mr. Drewes: It is inadmissible, your Honor. The witness has testified she turned over a certain amount of money to the defendant at a given time. The matter begins and ends there, unless there are similar questions to be asked of this witness.

The Court: I think counsel is entitled to elicit any conversations had with the agents.

Do you recall the conversation you had?

A. Yes. They wanted me to state the amount of money that——

The Court: You say "they." Were there two agents?

A. There were two men there.

(Testimony of Ella Widrin.)

Q. At one time?

A. At one time. And they wanted——

Q. Do you recall approximately the time?

A. Well, it must have been three years or more ago.

The Court: All right. Go ahead, counsel.

A. And they wanted me to sign a statement. They wanted to know if I would sign a statement that that was the amount that I had turned over, and I said, "Yes." So a few days later they came with a statement. There was wording in there that I didn't just understand, and it said I was signing at my own free will, which I didn't see why I should be more than willing to sign anything that I hadn't—that I hadn't said. I was willing to sign about the mother's money, but the other [278] words that they had in I didn't want to sign it. So after awhile he said, "Well, you know, I can take you down to the office."

I said, "Yes, but you can't make me say anything more than I said right here, and you can't make me sign this, because if you will record it the way I have answered," I said, "I will sign."

Q. (By Mr. Hagerty): Did you subsequently—did they leave the paper with you for your consideration?

A. No. No, they would never leave the paper in my possession.

Q. Did you offer to give them a statement that would be prepared by your attorney?

A. I sent them to my attorney and the attorney

(Testimony of Ella Widrin.)

made out the same—I still wasn't satisfied with the paper and I wouldn't sign.

Mr. Hagerty: You may cross-examine.

Cross-Examination

By Mr. Drewes:

Q. Mrs. Widrin, will you state the approximate date on which you turned over to Mr. Olender the money to which you have referred?

A. August the 24th.

Q. Of what year? A. 1945.

Q. Mrs. Widrin, when did your mother [279] die?

A. I think it was August the 23, 1945.

Q. Mrs. Widrin, state if you know whether your late mother filed income tax returns between the years 1938 and 1945?

Mr. Hagerty: Objected to as incompetent, irrelevant and immaterial. It is improper cross-examination, it is not within the scope of the direct.

The Court: Sustained.

Mr. Drewes: I have no further questions.

Your Honor, will you instruct this witness to remain in the Court? I may wish to call her at a later stage.

The Court: May I ask you to remain in Court?

(Witness excused.)

Mr. Hagerty: At this time, your Honor, I am waiting for my co-counsel. We have a witness due from Oakland. I thought he was out in the hall.

Your Honor, could we have a few moments recess? Mr. Reinhard hasn't come.

The Court: We will take the morning recess, ladies and gentlemen, at this time, a little bit earlier than usual, in order to provide counsel an opportunity to bring that witness in, and the same admonition to you not to discuss the case or form an opinion.

(Short recess taken.)

Mr. Hagerty: The defendant will call Mr. Reinhard. [280]

S. E. REINHARD

called as a witness by the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is S. E. Reinhard. My home address is 1030 Ashmont Avenue, Oakland.

Q. Your occupation? A. Banker.

Direct Examination

By Mr. Hagerty:

Q. Mr. Reinhard, you are connected with the bank in Oakland, are you? A. Yes, sir.

Q. Which bank is that?

A. The Bank of America.

Q. Is that the——

A. Oakland main office.

Q. Main office at 12th and Broadway?

(Testimony of S. E. Reinhard.)

A. That's right.

Q. Are you acquainted with the defendant Milton Olender? A. Yes.

Q. About how long have you known him?

A. Oh, for approximately twenty years.

Q. Are you familiar with his reputation in the community over there?

A. I believe I am, yes. [281]

Q. What would say his reputation in the community for truth, honesty and integrity is?

A. Well, in my opinion, good.

Mr. Drewes: Objected to, no proper foundation having been laid.

The Court: Where is the basis of the objection?

Mr. Drewes: No proper foundation has been laid, your Honor. He testified he has known the defendant for a period of years. I would like to know whom he has spoken to, whom he has talked to.

The Court: That is cross-examination.

Q. (By Mr. Hagerty): The reputation is good, you say?

A. In my opinion very good, yes, sir.

Q. You know the defendant's business?

A. Yes, I do.

Q. Of what is that?

A. Well, he specializes in men's clothing, working men's clothing, uniforms, and insignia and that sort of thing for army and navy personnel.

Q. Is that a salvage type of store or——

A. No, sir, it is not.

Q. Have you counselled with the defendant in

(Testimony of S. E. Reinhard.)

various business transactions? A. I have.

Q. From time to time. You act as his banker, is that true? [282]

A. Well, to the best of my knowledge.

Q. Along about 1948 did the defendant discuss with you any tax problems he had?

Mr. Drewes: Objected to, your Honor, being improper, being outside—immaterial and irrelevant to the period in question, the years '45 and '46. I don't know what the year '48 would possibly have to do with the matter.

Mr. Hagerty: It pertains to the problems of 1945 and '46. This is a preliminary question and we will tie it in immediately with the following question.

The Court: With that assurance, I will allow it.

Q. (By Mr. Hagerty): At that time what was the conversation you had with him, what did you say to him and what did he say to you?

A. Well, to the best of my knowledge he told me he was having some difficulty with the Treasury Department, they were going over his books, and they claimed that there was a tax deficiency or that his income was more than shown on his books. So I suggested that he go to a firm of accountants in our building known as D. A. Sargent Company and that they would—that they enjoyed a very high class reputation and they could probably work out his problems for him. I also mentioned that one of the partners in the firm was a tax attorney, and I thought it would work very well in his picture.

(Testimony of S. E. Reinhard.)

Q. And did you know the man who was the tax attorney? [283] A. Yes.

Q. Do you know his name? A. Yes.

Q. What is that name? A. Mr. Ringo.

Q. Mr. Ringo. And over the years have you made loans to the defendant in connection with his business? A. Yes, sir.

Q. Have you ever made recommendations to him in reference to investments? A. I have.

Q. Specifically have you ever recommended the transfer of cash balances into Government bonds?

A. I have.

Q. Can you recall the conversation on that particular subject?

A. No, I can't recall any conversation, but it was during the war loan drives. I happened to be chairman of the War Loan Drives in Alameda County, and naturally I wanted to see as many bonds sold for the war effort and also to build up our quota in Alameda County. So I not only spoke to Mr. Olender, I spoke to thousands of other people regarding investments in the Government bonds at that time.

Q. In your function as a banker is it your duty to examine net worth statements and [284] prepare them? A. From time to time, yes.

Q. For purposes of loans? A. Yes.

Q. The defendant, Mr. Olender, has some trustee accounts in your bank, is that true?

A. Well, I wouldn't say for sure. I believe he has, yes.

(Testimony of S. E. Reinhard.)

Q. Such accounts as that would you consider in a net worth statement, would you permit him to put such accounts in a net worth statement?

A. Trustee accounts?

Q. Yes. A. No, sir.

Q. They would not be proper? A. No, sir.

Q. Not in a net worth statement?

A. No, sir, it would not.

Q. Would it be proper for him to include the bank accounts in his wife's name?

Mr. Drewes: I am going to object.

Q. (By Mr. Hagerty): In a net worth statement.

Mr. Drewes: The witness has not been qualified as an accountant. He stated he is a banker. I can't see where his opinion as to what should or should not be included in a net worth statement is material.

Mr. Hagerty: A banker is an expert in the making of [285] loans.

The Court: Overruled. You may answer.

A. What was the question, please?

Q. (By Mr. Hagerty): I will withdraw the pending question and rephrase it. In preparing a net worth statement for a man to get a loan or in your function as a banker, would you consider among his assets a bank account in his wife's name?

A. No, sir.

Q. You would not? A. No, sir.

Q. Now further along that line, in connection with net worth statements would you say that a man should show on a net worth statement the stock in

(Testimony of S. E. Reinhard.)

an insolvent corporation as part of his net worth?

A. Well, if it had no value there would be no reason to put it in a net worth statement.

Q. In your conversations in transactions with Mr. Olender did he ever ask you to conceal any of the transactions? A. No, sir.

Mr. Drewes: Objected to, your Honor, as calling for hearsay testimony.

The Court: Overruled.

Q. (By Mr. Hagerty): I show you Government's Exhibits 30, 31, 32, and 33, which are U. S. Treasury Forms prepared by your bank. I guess they are familiarly known as P.C.R. [286] forms. That is, they relate to cash transactions. Do you recognize that type of form? A. Yes, sir.

Q. Those forms were prepared by your bank, can you tell?

A. Well, the forms are furnished us by the Federal Reserve or the Treasury Department and we fill them in as the currency transactions occur.

Q. The forms are to be prepared, are they, on all large cash transactions?

A. On any cash transaction of a thousand dollars or more. That was the law at that time.

Q. Would you have any idea, Mr. Reinhard, about how many of those forms you would prepare in the average week of business during the period of, say, 1945-46?

A. Well, my guess would be about 25 or 30 such forms a week, that is for the branch.

Q. For your branch alone?

(Testimony of S. E. Reinhard.)

A. For the particular branch, yes, sir.

Q. Then necessarily you would prepare forms of this type on many of your depositors, is that right?

A. On all cash transactions that were not in the course of the regular line of business. That is, if one of the larger stores came in and made a larger currency deposit, why, that wasn't necessary to make a report on that type of form. But on any individual that came in and made either a [287] cash deposit or a cash withdrawal of a thousand dollars or more, we made up such forms.

Q. You say that you prepared about 25 or 30 a week?

A. Well, that is a rough estimate. It might be fifty.

Q. You probably have close to 1500 a year then in that period of time. Of all those that were prepared did any of them result in tax prosecution cases, do you know?

Mr. Drewes: Immaterial, your Honor.

The Court: Sustained. Objection sustained.

Q. (By Mr. Hagerty): In connection with the preparation of those forms, Mr. Reinhard, were you ever subpoenaed into a trial like this?

Mr. Drewes: Same objection.

The Court: Sustained.

Mr. Hagerty: You may cross-examine.

(Testimony of S. E. Reinhard.)

Cross-Examination

By Mr. Drewes:

Q. Mr. Reinhard, you testified as to certain aspects of net worth statements. You asked for and received a number of net worth statements, I suppose, in the course of a year at your bank?

A. Correct.

Q. For what purpose do you ask for and receive such statements? A. For loaning purposes.

Q. For loaning purposes?

A. That's right, credit purposes. [288]

Q. And the purpose is to apprise the bank of the financial resources and background of the applicant? A. That's right.

Q. Is that correct? A. Yes, sir.

Q. In the preparation of a net worth statement would you include the bank account of a wife of the borrower if the funds in fact belong to the borrower? A. Include—I don't quite get that.

Q. You testified that in a net worth statement the bank account of the wife would not be included?

A. That's correct.

Q. If the funds in that bank account in fact belonged to the borrower, would they be included in the net worth statement?

Mr. Haggerty: Objected to, your Honor, as assuming facts not in evidence.

Mr. Drewes: It is a hypothetical question asked of this man who is an expert witness, a banker of many years background. I believe I can ask the same question.

(Testimony of S. E. Reinhard.)

The Court: Overruled.

Mr. Hagerty: I will withdraw the objection.

A. Not as far as the bank is concerned, no. In other words, if a savings account or a commercial account is in another's name, that is not considered in our opinion as any [289] asset of the borrower.

Q. (By Mr. Drewes): Wouldn't you want to know if the borrower had assets in the names of his wife or other persons?

A. Only if she was going to sign the note. In a great many cases we insist that the borrower and his wife both sign the note. In that case, why, we would insist on knowing her assets.

Q. Are you familiar with the measurement of income over periods by use of the net worth approach or system? A. Well, vaguely, yes.

Q. Would you explain your understanding of that accounting method of determining income?

Mr. Hagerty: Well, if your Honor please, I will object to this as improper cross-examination. It is outside the scope of the direct.

The Court: Overruled.

Mr. Hagerty: And there is no proper foundation laid, as a further objection.

The Court: Overruled.

A. Well, it is the usual habit—practice for all borrowers at the bank to file a financial statement with the bank each year, and those statements when they come in each year are gone over and we see the difference in net worth in the individual state-

(Testimony of S. E. Reinhard.)

ment, and our credit is extended entirely on the current financial statement. [290]

Q. (By Mr. Drewes): Yes. I understand that, Mr. Reinhard, but that was not my question. Let me rephrase it. It is true, is it not, that accountants often measure income by making a comparison of an individual's net worth as of two periods of time?

A. I believe so, yes.

Q. And there is a difference, is there not, between the net worth statements as prepared for that purpose and the net worth statements as prepared, for example, by a banker to determine a person's aggregate wealth at one period of time?

A. Yes, sir.

Q. Would you explain the difference between them? A. Well——

Q. I will withdraw the question. Let me ask you this. Is it not true that the net worth of an individual from a banker's point of view seeks to determine his total assets and liabilities and the value thereof as of a given date; whereas when an accountant uses a net worth approach, he is interested in determining the amount of his income derived by the individual between two successive dates, is that correct? A. That is correct.

Q. And in the case of the banker, the cost price of assets acquired is of no particular significance; it is their present value, is that not correct? [291]

A. That's right.

Q. Whereas with respect to the measurement of income by comparing net worths at two specific

(Testimony of S. E. Reinhard.)

dates, just the reverse is true, the present value of the assets is of very little interest, it is the cost price that is important, is that not correct?

A. You mean from the accountant's standpoint?

Q. Yes. A. Yes.

Q. Is that correct? A. Yes.

Q. And therefore, Mr. Reinhard, if funds were held by a taxpayer in a trustee account and it was shown that the source of the funds were from the earnings or other income of the taxpayer, then that would be included by the accountant in determining his income by the net worth method, is that not correct? A. That's right.

Q. And consequently in the same manner there might be funds in the bank account of a taxpayer's wife and his children, in the names of his children or in the names of other relations, and if it were shown that the source of those funds were from the earnings or income of the taxpayer, that likewise would be included in the net worth statement?

A. Not for loaning purposes. [292]

Q. Not for loaning purposes. That wasn't my question. I said likewise from the point of view of the tax accountant who is measuring income by the net worth statement?

A. You are referring to the bank, now?

Q. No, I am referring to the tax accountant or other accountant who seeks to measure income by comparing net worth statements, and my question was if it was shown that the source of the income in a wife's or child's account was the earnings or other income from the other income of the taxpayer,

(Testimony of S. E. Reinhard.)

wouldn't those bank accounts be included in the net worth statements of the taxpayer?

A. Well, I am not a tax accountant.

Mr. Hagerty: Just a minute. I will object, your Honor, on the grounds that this is invading the field that the witness is not necessarily qualified to answer. It calls for speculation and conjecture on his part, and furthermore the question, repeated so many times in this vein, ceases to become a question and becomes an argument.

Mr. Drewes: The defendant offered the witness as an expert, your Honor. He has answered certain questions with respect to what should or should not—

The Court: He may have answered it before. However, I will allow him to answer. I think you have covered the ground pretty well.

Will you repeat the question? [293]

(Question read by Reporter.)

Mr. Hagerty: I will object on the further ground, your Honor, that it is compound and ambiguous.

The Court: Overruled.

A. My answer would be, yes.

Q. (By Mr. Drewes): Mr. Reinhard, if a net worth statement were being prepared by an applicant for a loan at the bank as of the 31st day of December, 1946, and it subsequently appeared that on the 31st day of December, 1947, a certain number of shares of a corporation had become worthless,

(Testimony of S. E. Reinhard.)

how would you treat the item as of the last day of December, 1946?

A. As of the date the statement was submitted?

Q. Let me rephrase my question. The net worth statement is being prepared as of the last day of the year of 1946.

A. Yes.

Q. Subsequently, however, on the last day of the following year, 1947, the stock had become worthless. How should that item be covered on the net worth statement as of December, 1946?

A. Well, it shouldn't be carried as the value as of that time.

Q. As of 1946? A. Correct.

Q. That was for bank purposes?

A. Correct. [294]

Q. You have testified, Mr. Reinhard, that you have known the defendant for how long?

A. Approximately 20 years.

Q. Approximately 20 years? A. Yes.

Q. Had you heard, Mr. Reinhard, that in March of 1944 the United States District Court for the Northern District of California enjoined Milton Olender from selling sailor suits at prices in excess of the permissible prices under the Price Control Act in force and effect at that time?

Mr. Hagerty: I object to that question, your Honor. I cite it as misconduct. It is highly prejudicial, and I ask for a mistrial.

The Court: The objection is sustained. The question is stricken from the record and the jurors

are requested to ignore the question. Motion for mistrial is denied.

Mr. Drewes: No further questions.

Mr. Hagerty: Thank you, Mr. Reinhard. No further questions.

The Court: The witness is excused.

(Witness excused.)

Mr. Hagerty: At this time, your Honor, by and with the stipulation of Government counsel I would offer into evidence an affidavit of Judge Monroe Friedman and ask that it be marked as the defendant's Exhibit next in order. [295]

The Court: May I see it, please?

By stipulation this may be marked in evidence.

Mr. Drewes: So stipulated.

The Court: So ordered.

The Clerk: Defendant's Exhibit D in evidence.

(Thereupon affidavit of Monroe Friedman was received in evidence and marked defendant's Exhibit D.)

Mr. Hagerty: And at this time, your Honor, may I read it to the Jury?

This is an affidavit of Judge Monroe Friedman. It was signed the 13th day of September, 1948, before Howard H. Desky, a notary public in and for the county of Alameda, State of California. The affidavit is to this effect:

“Monroe Friedman, being first duly sworn, deposes and says: That ever since the year 1920 I have been and now am an attorney at law, duly and

regularly licensed to practice law before all the courts of the State of California; that ever since the year 1930, I have been and now am duly and regularly licensed to practice before the United States Supreme Court.

“That I have known Milton Olender for over thirty years; that I first knew him when we were both students at the University of California at Berkeley, California; that from 1940 on, I represented [296] him on a few occasions in some legal matters.

“That in the beginning of April, 1944, Olender called at my office and stated that he and his family were planning to go to Texas later in the month to visit his son who was in the United States Army and stationed in Texas; that he wanted me to have access to his safe deposit box during his absence, and to take care of any matters that might arise in his business during his absence.

“That on April 22, 1944, I met Olender by appointment at the Bank of America, National Trust & Savings Association, 12th Street and Broadway, Oakland, California; that on that day, safe deposit No. 56 in said bank was transferred from the names of Milton Olender and his wife to the names of Milton Olender and Monroe Friedman; that I went in with him to look at the safe deposit box itself; that Olender opened it in my presence; that there were several papers and some bonds in the box, and also over \$70,000 in United States currency; that Olender gave me the key to said box.

“That on May 5, 1944, after Olender had re-

turned from Texas I again met him at the same bank by appointment, and the same safe deposit box was transferred back to the names of Mr. and Mrs. Milton [297] Olender; that on that day, Olender opened the said box in my presence, and the contents were the same as on April 22, 1944; that I then returned the key to said box to Olender; that I did not open the said box at any time between April 22, 1944, and May 5, 1944, and that said two occasions were the only times that I ever saw the said box or any contents thereof.”

And it is signed by Monroe Friedman.

If your Honor please, may I pass this to the jury for their examination?

(Thereupon Exhibit D was passed to the Jury.)

Mr. Hagerty: At this time I call the defendant Milton Olender.

MILTON H. OLENDER

the defendant herein, being first duly sworn, testified as follows:

The Clerk: Will you please state your name, your address and your calling to the Court and to the Jury?

A. Milton Howard Olender, 121 Alpine Terrace, Oakland. I am the sole owner and proprietor of the Army and Navy Store in Oakland.

Q. Should I put “merchant” as your occupation?

A. Merchant.

The Clerk: Thank you. [298]

(Testimony of Milton H. Olender.)

Direct Examination

By Mr. Hagerty:

Q. Mr. Olender, where were you born?

A. San Francisco.

Q. Give the ladies and gentlemen of the jury the date?

A. December 6th, 1895, in the Mission District.

Q. Then your early education, where was that, spent here?

A. I went to Old Lincoln Grammar School on 5th Street across from the Mint before the earthquake. After the earthquake I went to Hamilton Grammar School, Henry Durant Grammar School, Hearst Grammar School, and graduated from Fremont, which is still out on McAllister Street. I then went to Lowell High School on Sutter Street, in the old building, and then went over to the new one, the one still out on Haight Street. I graduated from there in 1914. I then went to the University of California and graduated from there in 1918.

Q. What business was your father in?

A. He was a merchant, men's and women's clothing.

Q. And did your mother assist him?

A. Yes, very much.

Q. Did you yourself work with them?

A. Yes, ever since I was eleven years old.

Q. Following your graduation from the University of California, what did you do?

A. Well, immediately after graduation I went

(Testimony of Milton H. Olender.)

to work in the [299] shipyards, the Union Works in San Francisco, in the yards. I was 1-A in the draft, and was not called.

Q. That was in—— A. 1918.

Q. 1918.

A. In November, the 11th, when the war was over, about a week later I went to Fresno and went to work with my father, and later went over to my store that was given to me.

Q. What was the name of the concern of your father's?

A. The store that my father—my father had two stores, one in the Olender Building at 1820 Tulare Street. It was known as the Economy Department Store. The other store, across the street, was Olender's, and later was changed to Milton Olender's.

Q. How long had your father been engaged in business there in Fresno? A. From 1908 on.

Q. 1908 on. How many stores did he have?

A. Two stores.

Q. Two stores? A. At one time three.

Q. At one time three. And where were they located there, do you know?

A. Well, the first store was 1820 Tulare. The first store was 1833-35-37 Tulare, and then when they built the Olender Building in 1918 they moved over there. They had two stores, [300] rather, the Economy Store—he also owned the store—Harry Coffee's, which is still in Fresno, and sold it to Mr. Harry Coffee.

(Testimony of Milton H. Olender.)

Q. After you returned from school did they set you up in business for yourself?

A. Yes, they did. In 1920.

Q. In what store?

A. They gave me the 1833-35-37 store. My father and my uncle both owned that store and they turned it over to me and they ran their own store across the street.

Q. You speak of 1833-35-37—you have reference to street numbers, do you? A. Yes.

Q. What street? A. Tulare Street.

Q. Tulare Street. Is that the location of the Olender Building?

A. 1820 Tulare Street, across the street.

Q. Across the street? A. Yes.

Q. Did your father also own a hotel there?

A. Well, the hotel is in the building. He did not own the hotel. The hotel was leased.

Q. I show you, Mr. Olender, a series of photographs and ask you if you recognize them? [301]

A. I do.

Q. What are they?

A. They are pictures of the exterior of the Olender Building in Fresno and also the interior upstairs and downstairs, the first floor and the basement, and they are pictures of the vault.

Mr. Hagerty: I would like to offer these in evidence, your Honor, as the defendant's next in order.

Mr. Drewes: Objection, your Honor. They are immaterial, irrelevant. Furthermore, no proper foundation.

(Testimony of Milton H. Olender.)

Mr. Hagerty: I make the offer, your Honor, to show the acquisition of assets by the father and the corpus that came to the defendant through inheritance. That set up the original——

The Court: They may be marked for identification.

The Clerk: Defendant's Exhibit E for identification only.

(Thereupon the photographs were marked for identification only, defendant's Exhibit E, as a collective exhibit.)

The Court: When were these photographs made?

A. 1948 or 1949.

Q. (By Mr. Hagerty): These photographs were made following the death of your father, is that right?

A. Yes.

Q. And prior to the death of your mother? [302]

A. Yes.

Q. These photographs only show the Olender Building interior and exterior?

A. Yes.

Q. Do they show the store that you first started with?

A. They show the store I first worked in but not the store that I owned. The store that I owned is across the street from there.

Q. What was that street address?

A. 1833-35-37 Tulare Street.

Q. And this Olender Building is on the even side of the street, is that right?

A. Yes.

Q. When you went into this store of your own,

(Testimony of Milton H. Olender.)

when was that about—can you fix the time?

A. Either late in 1919 or very early in 1920.

Q. Do you have any idea of the approximate inventory in that store when you took it over?

A. It was in excess of \$50,000.

Q. In excess of \$50,000. Now, how long did you have that store? A. Till about May, 1923.

Q. Till about May of 1923. And what would you say had been your success or failure in business there, what had been your results? [303]

A. It had been very successful.

Q. The income from that store, did you get—did you keep it or—

A. The funds of the store—the store was given to me to do as I pleased with it, and they told me to reduce the inventory as low as I wish. They actually wanted to get rid of that store finally because they wanted to—wanted to take me over into the other store and put me in full charge of that and give me that one, but we had two places and they just didn't want to. In other words, we were in competition with ourselves.

Mr. Drewes: Objected to and ask that the answer go out as not responsive, your Honor.

The Court: Overruled.

Q. (By Mr. Hagerty): And then how did you happen to leave that store?

Mr. Drewes: Objected to, irrelevant, immaterial. The entire line of the examination seems to have no bearing whatsoever on the issues now before this jury.

(Testimony of Milton H. Olender.)

The Court: Overruled.

A. Well, you stated in your opening statement I had been going with a young lady who later became my wife, the mother of my children, and my parents objected very strenuously.

Q. (By Mr. Hagerty): Speak a little louder, Mr. Olender.

A. My parents objected very strenuously. There was an [304] additional objection which you didn't mention and which has proved a very great blessing to me. My wife had been married before and had a son about three years old, and I have raised that son and he is a most devoted son to me.

Q. Your family objected to your wife on religious grounds?

A. And the fact that she had been married and had a son.

Q. So what was the result, what did you do?

A. Well, it got pretty tough—was a constant wrangle. They also were of the opinion, as many parents are, that the woman I married is “after our money.” I said, “If you think that is the case, you can have your money, you can have your business, I am going out on my own, and just take it back.”

Q. So you severed relationship with your father in that store, is that true? A. That's right.

Q. What did you do in severing the relationship; did you give back the money? [305]

A. I had given Jim considerable money prior to that time and at the time of my leaving there was \$6,000 in my bank account and I wrote checks out

(Testimony of Milton H. Olender.)

for that and turned that over to him, leaving, I think, something like 94 cents in the bank at the time.

Q. And then what did you do?

A. I went to work for the Euless Realty Company, a real estate firm next door to my father's store.

Q. Would you just give a rapid rundown of what you did then for the next four or five years? You got married in the meantime, didn't you?

A. Oh, yes—no, I went to work for the Euless Realty Company first. After leaving, and in 1924, I got married. A year later, April—or July 28, 1924, and I had left the firm Euless Realty Company.

Q. You will have to keep your voice up because I'm afraid—

A. I'm sorry. I left the firm of Euless Realty Company and worked for many different concerns. I believe I came up to San Francisco and worked for Hanson and Elrich, an old established furnishings goods firm at Third and Market.

Q. Would it be fair to say, Mr. Olender, that for the next three or four years then you worked as an employee in various dry goods concerns, is that right? [306]

A. That's right.

Q. Did you return to the employment of your father at any time?

A. Just prior to that I had been the manager of the men's department in Raydon and Kemps store in Fresno, the largest department store there

(Testimony of Milton H. Olender.)

at the time, and my father had repented pretty much by that time. I had a son a couple of years old, and he said, "Milton, why don't you come back. I will open the economy store for you, put you back in there on the same status that you were before."

Q. Where was that store?

A. That's the 1820 store.

Q. 1820 store? A. Yes.

Q. That's the one that is represented in the picture? A. In the pictures.

Q. By these photographs, is that true?

A. That's right.

Q. Is that located in what is known as the Olender building? A. It is.

Q. That building belonged to whom?

A. It belonged to my father and my uncle, but during the years 1919 until the day of my marriage my father and uncle, [307] who had supreme confidence in me, made me the trustee of that building, and the building was entirely in my name. I signed all leases and transacted all business of the building.

When I got married, along with the cash that I turned over to my father, I voluntarily revoked the trusteeship.

Q. In other words, that trusteeship antedated your marriage? A. Yes.

Q. Are there any other business establishments in that building than the store?

A. At that time there was a grocery store and men and women's clothing store run by a Mr. Bidegary, who was a sheep man whose sole business

(Testimony of Milton H. Olender.)

was just with the sheep people around the valley there. He was no competitor at any time of ours, just had his own personal trade, and there was the hotel lobby and the hotel and just the large store, the 1820 store.

Q. Well, you returned to the store in what year?

A. I believe it was 1926.

Q. And then will you tell his Honor and the ladies and gentlemen of the jury what happened next?

A. Well, when I originally opened the first store I had opened it because again, as you stated in your opening [308] statement, I decided to run the store on modern principles the way I wanted to run it and not on the old fashioned principles that had been antedated by that time or antiquated.

Q. What is that word that you used—what is that word that you call that type of store, that your father had? A. Get what you can get?

Q. What?

A. I think it was get what you can get.

Q. Did you say "Schlock" store?

A. Well, yes.

Q. What does that mean?

A. That term is used—in the early days stores did not mark merchandise, there were no O.P.A.s or O.P.S.s in those days and you had a secret code on your merchandise and the customer came in and you asked him a price for the item and if he looked like he could pay it, why, he would get it, and if he didn't want to pay it, why, he would get somewhere

(Testimony of Milton H. Olender.)

down to the point where you still made a profit but you sold it. But there was no set price and I wasn't built that way. I want the store to be run on proper principles, all merchandise marked, nobody to pay any more or any less than anybody else and I took no offers in my business. When a price is set, that was [309] it and I didn't accept anything else.

Q. Well, now, did that bring you in conflict again with your father?

A. Yes, it did. When I went into that store it was with that understanding, my father and uncle both came back there to help me and I said, "I want to establish a one-price store, and the first time I see a price cut in this store I am going to walk out," and that is exactly what I did.

Q. I show you a series of checks, Mr. Olender, and ask you if you can identify them?

A. I do.

Mr. Hagerty: At this time, your Honor, we ask that these checks be marked for identification until they can be identified.

The Court: As one Exhibit?

Mr. Hagerty: Yes.

The Court: They may be marked as one Exhibit for identification.

The Court: It is about the noon hour, Mr. Hagerty.

Mr. Drewes: If your Honor please, if we are going to take the noon recess, may I address the Court very briefly in the absence of the jury?

The Court: Certainly.

The Clerk: Defendant's Exhibit F for identification only. [310]

(Group of cashed checks for identification only, Defendant collective Exhibit F.)

The Court: Do you have any other exhibits for identification?

Mr. Hagerty: No, not at this time.

The Court: Ladies and gentlemen, we will take the noon recess and resume at two-thirty this afternoon, with the same admonition not to discuss the case or form an opinion until the matter is submitted to you.

Two-thirty this afternoon.

I wish to hear from counsel.

(Following proceedings heard outside the presence of the jury.)

Mr. Drewes: If your Honor please, several days ago Mr. Lewis advised me in the course of conversation that he had intended to subpoena a character witness other than the gentleman who appeared this morning. As far as I know he still intends to do so. And it is for that reason that I bring up the subject of your Honor's ruling this morning. The offer made, the question asked was asked, I assure the Court, in good faith. It seems to me that questions as to whether or not an individual has been enjoined from violation OPA regulations in 1944, during the war years, has a direct bearing on reputation.

The witness testified that he knew the reputation and it was good. The question asked of him did

not enlighten [311] knowledge of his reputation as to any particular trait, just his reputation in general. Now, the violation for which the defendant was enjoined by this honorable Court in 1944 is precisely the type of transaction concerning which a considerable amount of evidence has already been put into the record in this Court. The law on the subject, as I understand it, is essentially that the trial court should have the broadest discretion, and the nature of the testimony, it must be necessarily controlled, but I submit, your Honor, that when the defendant on the particular facts which are now in evidence in this record submits to this jury the issue of his reputation, then most certainly the government should have the right to question character witnesses concerning their knowledge of any transactions which I say are closely not only in time but in nature related to those which are already in the record that have bearing on his reputation in that community.

The Court: What was the precise form of your question?

Mr. Drewes: I asked, as I best recall it, your Honor, whether or not that witness knew that the United States District Court for the Northern District of California had in March of 1944 enjoined the defendant for selling suits at prices in excess of those that were then [312] permitted by the law. That is to the best of my recollection the question that I asked. I submit, your Honor, that your Honor will reflect——

The Court: What have you to say?

Mr. Drewes: —in those years during the war there was a considerable amount of publicity given to these enforcement—a tremendous amount of publicity given to the enforcement of the OPS.

The Court: Many complaints were filed and some went to judgment and others did not go to judgment.

Mr. Drewes: This one went to judgment.

The Court: Is there a judgment in existence?

Mr. Drewes: There is a judgment in existence.

Mr. Hagerty: As I understand it, your Honor, he was represented at that time by Monroe Friedman, and I understood he came out successfully in it.

The Court: Do you have the records on that?

Mr. Hagerty: By inference that infers a violation, a crime, a misdemeanor, which is, as counsel well knows, prejudicial to bring up in an action like this, and it is done only for one purpose, to smear the defendant.

Mr. Drewes: Your Honor, in the leading case——

The Court: Do you have any precise authority on the subject? I would like to examine the record, if there is a record. Would you leave it with the clerk of my [313] Court?

Mr. Drewes: Would the clerk be kind enough to get the file in number 22932 G?

The Court: Do you have a record of this?

Mr. Drewes: Yes.

The Court: Let me see it. I will examine it during the noon hour.

Mr. Drewes: If your Honor please, as I recall

the leading case on the subject is in 335 U. S. I believe it is the Michaelson case. However, I will get that citation for you and give it to your law clerk.

The Court: Authorizing on cross-examination reference to any such judgment in a matter of this character?

Mr. Drewes: To that precisely, and, your Honor, I don't recall having seen such. I will attempt to find one. I will examine the authorities for that purpose.

The Court: As illustrative in the form of the stipulation under this second paragraph, as bearing upon the production of this subject matter:

“Whereas the defendant claims that the said violation as set forth in the said complaint was unintentional on his part, and the parties hereto desire to avoid the time and expense of proceeding to trial in said action and the plaintiff and defendant, and each of them is, willing that in full settlement of any and all violations which might have [314] occurred subsequent to the effective date of the said regulation and up to and including the date of filing said complaint that a decree may be entered in the form annexed hereto enjoining the defendant from all further violation.”

There were many forms of judgment entered into, as I recall, during those years and I think you may well be bordering upon error in questioning the character witness as to the truth, honesty and integrity of a man in a community wherein he resides in making reference to a judgment of this character.

However, I am always open to further argument, in case I am incorrect I will revise my thinking on the subject.

Mr. Drewes: I just want to state in that connection, your Honor, that we are dealing here with reputation, not with the truth of the allegations which are made. The law is that they may be made in good faith——

The Court: Let us analyze your position. The defendant is charged with felonious conduct in this case, and he produces a witness, a banker from Oakland, who testifies as to his truth, honesty and integrity, that being the trait involved in the community wherein he resides. He said as far as he knew it was all right.

Mr. Drewes: He said only reputation.

The Court: Reputation. All right. On cross-examination [315] you alluded to a complaint for injunctive relief which was filed by the government through Mr. Bowles, the price administrator, and a stipulation for judgment. This is a civil matter, bear in mind.

Mr. Drewes: And a judgment——

The Court: This is a civil matter.

Mr. Drewes: That's correct.

The Court: As you may recall, and as the Court recalls, many of these matters (not all of them perhaps) but many of them were the result of unintentional conduct on the part of an individual as illustrative of the defendant here, and the defendant here in the stipulation refers to "unintentional" conduct on his part, and so forth and so on. Now it

may be that it is a borderline situation—I view it——

Mr. Drewes: I prefer not to prejudice the record, your Honor, by making——

The Court: I have tried the cases on the theory that: What does it profit that the government or the defendant if they press upon the Court that which hereafter results in reversible error. Much money is spent by the government in these cases and much money is spent by defending in a case, and I consider it a borderline situation fraught with difficulties and open to much argument. If I were presenting the case, I wouldn't press it upon [316] any Court. However, if you do, and you submit authority, I will review the authority and I will reserve my ruling.

(Thereupon the afternoon recess was taken, until two-thirty o'clock p.m.) [317]

September 21, 1952—2:30 P.M.

Mr. Hagerty: At this time, with the Court's permission, we desire to put on a short witness out of order.

Mr. Lorenzen, will you take the stand, please?

HIRAM A. LORENZEN

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, address and occupation to the Court and to the jury.

A. Hiram A. Lorenzen, 710 Walla Vista Street, Oakland, California.

(Testimony of Hiram A. Lorenzen.)

Q. Occupation?

A. I am secretary-treasurer of Money Back Smith Company.

Direct Examination

By Mr. Hagerty:

Q. What is the Money Back Smith Company, Mr. Lorenzen?

A. It is one of the largest men and boys clothing stores west of Chicago, as we advertise.

Q. Where is it located?

A. At 12th and Washington Streets.

Q. 12th and Washington Streets?

A. In Oakland.

Q. In Oakland? . . . A. Yes.

Q. You are employed there as the secretary-treasurer of [318] that corporation?

A. That is correct.

Q. Are you acquainted with the defendant, Milton Olender? . . . A. I am.

Q. How long have you known him?

A. About 25 years.

Q. Have you had occasion to do business with Mr. Olender? . . . A. Yes, I have.

Q. What would you say is his reputation in that community over there for truth, honesty and integrity? . . . A. I think it is the best.

Q. What business transactions has your concern had with Mr. Olender?

Mr. Drewes: Objected to as immaterial, irrelevant.

(Testimony of Hiram A. Lorenzen.)

Mr. Hagerty: It is preliminary, your Honor, to show again bearing on the net worth and expenditures methods, the net worth and various expenditures that were made during the course of the years, in question, '45 and '46.

Mr. Drewes: I don't understand, your Honor, what transactions in connection with net worth.

Mr. Hagerty: It is a little bit involved but I can show——

The Court: I will permit you to go ahead, but I will grant motion to strike it if it appears to be irrelevant. I can't thus far see the reason but I will [319] let you go ahead.

Mr. Hagerty: These transactions will later be reflected in our books.

The Court: All right.

Q. (By Mr. Hagerty): Directing your attention to, say, the year 1944, Mr. Lorenzen, did you have any transactions with Mr. Olender, your concern?

A. Yes, we did.

Q. What were the nature of those transactions?

A. Well, they were sale of surplus merchandise or merchandise that we could not sell in our own store, that we didn't want to sell in our own store, because of the type of merchandise that it was at that time.

Q. And Mr. Olender bought these goods from you, did he? A. He did.

Q. Do you know the method of payment for these goods?

(Testimony of Hiram A. Lorenzen.)

A. Well, he paid in cash most of the time for them.

Q. Now these goods he bought, was there more than one occasion when he bought goods from you?

A. Oh, yes, quite a number of occasions.

Q. A number of occasions? A. Yes.

Q. Directing your attention to the years '44, '45 and '46. A. That's correct.

Q. During that period of time? [320]

A. Yes.

Q. And would you have an idea as to about the size of the lots of goods he bought, how much they were?

A. They amounted to four, five hundred dollars.

Mr. Hagerty: No further questions in this respect at this time.

Mr. Drewes: Your Honor, may the question and response be stricken with respect to the transactions between himself and the defendant?

The Court: You say you have reference to this at a later stage of the trial?

Mr. Hagerty: Yes.

The Court: I will reserve my ruling.

Mr. Hagerty: I will tie them through the defendant and his books.

The Court: Are you finished with this witness?

Mr. Drewes: Yes. I have no questions.

Mr. Hagerty: You may cross-examine.

Mr. Drewes: I have no questions.

The Court: This witness is excused.

(Witness excused.)

Mr. Hagerty: Mr. Olender, will you resume the stand, please.

MILTON H. OLENDER

having been previously sworn, resumed the stand and testified [321] further as follows:

Direct Examination

(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, I again show you defendant's exhibits F and F-1, four pages of checks, Defendant's Exhibits F and F-1 for identification, and ask you if you can tell his Honor and the ladies and gentlemen of the jury what those checks represent, what payments they represent?

A. Those checks represent payments on my checks with my name printed on the side, signed by me to my father, my uncle, and to the partnership of my father and my uncle, in the years 1920 and '21.

Q. What is the total, what is the total of the payments? A. Very close to——

Mr. Drewes: Object—don't answer, please, Mr. Olender. I object, your Honor, on the grounds that the documents have not yet been put into evidence.

Mr. Hagerty: I will offer them in evidence.

Mr. Drewes: I will object, your Honor, on the grounds they are remote, irrelevant and immaterial. I see no point in cluttering the records.

Mr. Hagerty: I offer them in evidence, your Honor, to prove the inception of the net worth of

(Testimony of Milton H. Olender.)

this defendant. He had the store and the difficulty arose between him and his father, and he gave back—he had been giving back [322] the money—he gave the whole thing at once back and left the store, although it was money that belonged to him, and it totals approximately \$40,000.

Mr. Drewes: That is 1921?

Mr. Hagerty: At the inception of his net worth it runs right down to date.

The Court: Do you expect to incorporate any of these items in a statement to be submitted on behalf of the defendant, is that your point?

Mr. Hagerty: Well, later through the accountant we will establish and trace his net worth from the beginning.

The Court: As of what base period?

Mr. Hagerty: Well, it will come back through the funds that his father gave him and this \$75,000 in cash that he brought up from Fresno at the death of his father and put in his safety deposit box in Oakland.

The Court: This item here in 1920, '21, would have no relevancy to the items you speak of.

Mr. Hagerty: Yes, it shows the source of the funds. He earned this money in operating this store, and when the religious difference—

The Court: But, counsel, if you will pardon my interruption, if he relinquished any claim to these funds in 1920, '21, and if the checks represent funds he [323] transferred back to his uncle and his father or both members as the copartnership, and

(Testimony of Milton H. Olender.)

the transactions were closed, how would they have any legal or logical relevancy to the transactions in 1943, '44, '45, '46?

Mr. Hagerty: Because his father stood in abeyance on the subject, and always said, "Well, it's Milton's money, I am going to give it back to him." In other words, there was never a full acceptance of the funds in the whole sense of the word by the father, and this is the basis of Mr. Olender—Milton Olender, the defendant, start in business.

Mr. Drewes: If your Honor please, you will recall that the Government put into evidence a net worth—an exhibit showing that the defendant's net worth as of 1941-1947, as prepared by the defendant's accountant, so I see no useful purpose in going back beyond that period. It is very remote and tenuous and simply encumbers the record and takes us off on a side venture.

The Court: That is true, but after the defendant is entitled to explain on the net worth breakdown items of cash in the amount of—May I have my file folder, Mr. Clerk—items of cash which are in dispute. The items of cash are in dispute, are they not?

Mr. Hagerty: Yes, your Honor, they are in dispute, and in particularly the amounts which were in the safety [324] deposit box in Oakland which had their origin really in these transactions.

The Court: This defendant claims, as I understand your intention, your argument, that large

(Testimony of Milton H. Olender.)

amounts of cash were received from his father's estate.

Mr. Hagerty: That's right.

The Court: Now you desire to show——

Mr. Hagerty: And from his father during his lifetime. The father died in 1942.

The Court: You desire to show motivation and consideration?

Mr. Hagerty: Yes, your Honor.

The Court: Antedating the transaction wherein moneys were given to this man?

Mr. Hagerty: That is true.

The Court: About his father or his mother, is that true?

Mr. Hagerty: That is true.

The Court: For that purpose I will allow these checks in evidence. They may be marked.

The Clerk: Defendant's Exhibit——

The Court: One moment. Before allowing these checks, I would like to permit the United States Attorney's office to examine on these checks. You may if you wish. These checks are made to various persons. [325]

Mr. Hagerty: Those are the checks, your Honor. Your Honor, the reason we show those is to show that—that one your Honor picked there—is to show that this defendant was paying the bills, and the other checks that he has given during that period of the——

The Court: There isn't any dispute on that, is there, that he was acting in that capacity?

(Testimony of Milton H. Olender.)

Mr. Hagerty: We thought there might be so we put them in to cover both sides.

The Court: There is another group here.

Mr. Hagerty: I might ask the defendant another question. Do those checks represent all the payments you made to your father and to your uncle? A. No, sir, they do not.

Mr. Drewes: It may be a misunderstanding here, your Honor. Do I understand that these are being offered in evidence by counsel for the purpose of supporting the witness' testimony that he furnished or turned funds over to his father?

Mr. Hagerty: That is right. When the family broke up over his impending marriage, he gave the store back and the money, too.

The Court: When did you marry?

A. I married in 1924.

Mr. Drewes: Are these payments to his [326] father—

A. I gave those back, the whole payment, during the final period when I got married—when I left the store, I should say.

The Court: Have you examined these checks?

Mr. Hagerty: I showed them to him, your Honor.

Mr. Drewes: I have not seen them myself, your Honor. I turned them over to our accountants for examination.

The Court: Let's take an item of December 7, 1920, \$5038, signed Mr. Milton Olender to the order of J. S. Olender. A. J. and S. Olender.

(Testimony of Milton H. Olender.)

The Court: What is your statement concerning that check, Mr. Olender?

A. I wouldn't remember the exact details but it probably was some sum that would bring my bank balance down to an even amount. It's a payment that I gave to them.

The Court: To the partnership?

A. Yes. They may have needed that much money to pay the bills in their own business.

The Court: In other words, these were inter-partnership transactions?

A. I was not a partner with them.

The Court: That was not a gift of money to them? A. Oh, no.

The Court: You were handling the accounts and when they [327] asked for money, you gave them money?

A. I gave them money, yes, sir. In fact, I was doing a better business than they were with my modern methods.

The Court: This money belonged to them, did it not? A. No, sir.

The Court: \$5038.

A. No, sir, it was my money.

The Court: You have the books of account going back to that period of time?

A. No, I haven't.

The Court: Do you have any check registers as of that time? A. No, I haven't.

The Court: Do you have the partnership accounts as of that period of time? A. No, sir.

(Testimony of Milton H. Olender.)

The Court: I will reserve my ruling on this. I will allow the Government and their accountants to look over these items. It is rather difficult for me to orient myself to that period of time.

You say you made advances to the copartnership, did you?

A. I gave them money whenever they needed it.

The Court: That's 1920?

A. 1920 and 1921. I took the store over the early part of [328] '19—or the early part of 1920—or the latter part of 1919. I don't exactly remember. It was in that period, and from then on I gave them these checks and it was my money and I was giving it to them.

The Court: I will reserve my ruling on these checks, gentlemen.

The Court: What was the relationship—may I ask a couple of questions?

Mr. Hagerty: Surely.

The Court: What was the relationship between the copartnership consisting of your uncle and your father? That was a separate enterprise, was it?

A. Yes.

The Court: That was run independently of any enterprise that you operated?

A. That's right. They both owned the business that they gave to me, and they both gave me that store, the two of them.

The Court: They gave you that store in 1920?

A. Either the end of 1919 or the beginning of

(Testimony of Milton H. Olender.)

1920. It's within November of 1919 and February of 1920.

The Court: When did you graduate from school?

A. 1918.

Q. Where did you keep these checks during the interval of time? [329]

A. I found those checks in the vault and I had put them away myself at the time I left Fresno.

The Court: Where?

A. In the vault in the Hotel Traveler.

Mr. Hagerty: We have got a photograph of the vault. That is the purpose of the purchase that I was offering in evidence. I might add further——

The Court: Do you have the books of account now?

A. No, I haven't. I tried to find those but they were not there.

The Court: All right.

Q. (By Mr. Hagerty): Mr. Olender, these photographs that I showed you in the forenoon session in reference to the Olender building in Fresno, do you have an interest in that building?

A. Yes, I do.

Q. Did you have an interest in that building during the years 1945 and '46? A. I did.

Q. How long have you had an interest in that building?

A. Ever since the death of my father in 1940, though I actually didn't get the interest until the estate was closed, which I believe it was 1942.

Q. Were you ever made trustee of that building?

(Testimony of Milton H. Olender.)

A. I was in 1919 or '20. [330]

Q. By whom?

A. My father and my uncle, who owned the building.

Q. And as trustee of the building what were your duties?

A. I made all the leases, collected all rents, and managed the property.

Q. These photographs that I had shown you earlier in the trial, which are marked Defendant's E for identification, do they give a fair representation of the building as it existed in 1945 and 1946?

A. Yes, they do.

Mr. Hagerty: I again renew my offer to put them in evidence, your Honor.

Mr. Drewes: Objection, your Honor. I don't want to appear to be captious. I see no reason for burdening the record with matters of this kind.

The Court: Sustain the objection.

Mr. Hagerty: It is part of his net worth, your Honor, and I want to develop evidence in reference to this vault and where these checks were found, and it is part of his net worth that shows the type of building that it is. It is part of his assets.

Mr. Drewes: What do the pictures add to his testimony?

The Court: I can't see the pictures as part of his assets. [331]

Mr. Hagerty: Well, he has revenue and was receiving revenue from these properties in the course of the years in question. It is just a further ampli-

(Testimony of Milton H. Olender.)

fication of the evidence so the jury may see for its information what the building looked like, the size of it, and the various other aspects, and it will help them determine this.

The Court: I can't see that the size of the building would aid the jury. If he received \$10,000 a year income from the building, that should show in the accounts. The building may be of grand scale and yet it may not prove to be income bearing. I can't see that the picture would help you.

Mr. Hagerty: Well, the photograph itself of the store——

The Court: Nor would they be material.

Mr. Hagerty: ——a photograph of the store in the building would give an idea of the store when it was in operation.

The Court: Suppose it operated at a loss?

Mr. Hagerty: Well, in this——

The Court: Would the size have any criterion of value?

Mr. Hagerty: Maybe it might operate at a bigger loss.

The Court: I can't see it. [332]

Mr. Hagerty: I will submit to your Honor's ruling. I——

The Court: I am perfectly willing that you have in evidence anything that may help you, but I can't see that the photograph will assist you in the presentation of your case. If you have accounting data that relates to the period of time in question, that would seem to suffice.

(Testimony of Milton H. Olender.)

Mr. Hagerty: Well, I felt that the photographs indicate that it is business property and obviously from the photograph you can realize that in thirty years this type of building as property itself has materially increased in value, and the defendant inherited it as part of his net worth.

The Court: Were there probate proceedings on the death of his father? A. Yes, sir.

Mr. Hagerty: I assume so.

The Court: Was there a distribution of the estate? A. Yes, sir.

Mr. Hagerty: I wasn't attorney of record.

The Court: Was there a final distribution?

A. Yes, sir.

Mr. Hagerty: At that time I was not of counsel so I don't know.

A. There was. It is of record. [333]

The Court: When do you start with the accounting data, as of 1920, '21, on your breakdown? I have to have some starting point in mind. I just can't rule——

Mr. Lewis: Our starting date is 1944. That is, during the year 1944, your Honor. I think, as a matter of fact, that it probably would be better to go ahead with the case in questioning him about the father's funds, where they were——

The Court: All right.

Q. (By Mr. Hagerty): I show you, Mr. Olender an Army and Navy Store check. Do you recognize it? A. Yes, I do.

Q. Did you make that check? A. I did.

(Testimony of Milton H. Olender.)

Q. What is the date of it?

A. December 23, 1944.

Q. That is in connection with your operation of the Army and Navy Store, 10th and Broadway?

A. Yes, sir.

Mr. Hagerty: At this time I offer this check in evidence.

Mr. Drewes: Objection, your Honor, on the grounds it is a matter covered in the stipulation.

The Court: May I see it, please? Is this the subject of the stipulation, Mr. Drewes? [334]

Mr. Drewes: The stipulation for the three years in question includes the items under assets of the Army and Navy Store, the cash in bank 1944.

The Court: Do you have any specific purpose in this?

Mr. Hagerty: Yes, your Honor. That was an outstanding check which the stipulation itself says "Cash in bank (net after outstanding checks)." Now, this is an outstanding check that would increase the net worth \$1,000, because it was outstanding, we didn't know about it.

The Court: The clearing house endorsement is January 10, 1945.

Mr. Lewis: The check, your Honor, was December 23. The stipulation is merely the amount net after the outstanding checks as of December 31st, and so that \$1,000 was available to him and not taken in on the stipulation at all.

Mr. Drewes: The effect of that is to impeach the stipulation.

(Testimony of Milton H. Olender.)

The Court: Those are matters of accounting. The government counsel may examine the check and submit it to the accountants. If the funds be available as of that time, it might be added to his net worth.

Mr. Hagerty: That is our position.

Mr. Drewes: Our position is that it is included in the net worth. The stipulation covers it.

The Court: Is it or isn't it? I don't know. I can't [335] break this accounting matter down in 24 hours. You hand me the result of two or three years work in the brief period of two or three days. I can't analyze it.

Mr. Hagerty: Our accountants tell us that it is.

The Court: All right. Is it or isn't it?

Mr. Lewis: I am certain it is, your Honor. If it is in his pocket and the stipulation provides that after outstanding checks, and it shows it was not cashed until January 10th.

The Court: Examine it at the recess period time. You can examine it at the recess.

Mr. Drewes: We have examined it, your Honor. Our accountants point out to me that the check is made payable to M. Olender, payable to himself, so that if the matter were not included in cash, it would necessarily be included among his other assets. In other words, it was drawn on December 23, 1944, and presumably put in his wallet, so therefore it is either cash in bank or it is another asset in his possession, so the matter is a wash entry. Further, as we interpret the parenthetical phrase "net after

(Testimony of Milton H. Olender.)

outstanding checks," to mean outstanding checks had been compensated for, that the accounts had been reconciled, that that would have been added. If payable to himself—I beg your pardon.

The Court: I would assume that on a breakdown of the net [336] worth that the accounts would arrive at a reconciliation of outstanding items, it would seem to me.

Mr. Drewes: Certainly. In any event, this was in his possession, your Honor, and it is an asset whether in the bank or in his wallet, and it makes no difference. It would not be a net deduction.

Mr. Hagerty: If your Honor please, could we mark it then for identification, and when our accountant takes the stand—

The Court: Yes.

Mr. Hagerty: We will let him give his interpretation.

The Court: I think I would be in a much better condition if I heard from the accountants before I ruled on the matter.

The Clerk: Defendant's Exhibit G for identification only.

(Thereupon check in the sum of \$1,000 payable to M. Olender marked Defendant's Exhibit G for identification only.)

Q. (By Mr. Hagerty): Mr. Olender, when you started this second store after the reconciliation with your father in Fresno, how long did you operate the second store? A. You mean in 1926?

(Testimony of Milton H. Olender.)

Q. 1926, following your marriage and following the birth of your young son, your father's reconciliation with you, [337] and he called you back to start another store, and he said he would let you operate it, is that right? A. Yes.

Q. Is that a rough, quick sketch of what you said earlier before noon? A. Yes.

Q. How long did you stay in that store?

A. About three months.

Q. And you then severed relations again, did you? A. Yes, sir.

Q. Then what did you do, give us a quick sketch of your occupation from there up until your present—we will say until 1944 in Oakland?

A. Well, I can't give you an accurate sketch of it. I know that I worked in several places. I believe——

Mr. Drewes: If your Honor please, in the interests of orderly procedure, might I object here on the ground that this calls for a recital. If questions are asked of the witness, then of course, the Government would have its opportunity to make the appropriate objection. I don't know what is coming in.

The Court: All right. You may go ahead.

Mr. Hagerty: This is in the interests of time.

A. I don't remember just exactly now where I worked when I left there in 1926. [338]

Q. (By Mr. Hagerty): Well, would it be fair to say that following severed relations with your

(Testimony of Milton H. Olender.)

father that you went to work as an employee in various dry goods or clothing firms?

A. Yes, sir.

Q. In and about the Bay area? A. Yes.

Q. Is that right? A. That is right.

Q. When did you start into business for yourself again?

A. Well, I first worked for an uncle of mine in the Broadway Department Store, 2067 Broadway, and he owned a building at 8th and Broadway, and he had an empty store in that building and he had considerable merchandise in that store that was more than he needed, so he set me up in business at 8th and Broadway. The fixtures were in the store, all that I had to do was just put the merchandise on the wall fixtures and start work.

Q. About what year was that?

A. Between '27 and '28.

Q. All right. Now, how long were you in operation at that location? A. About a year.

Q. And then what happened, if anything?

A. I moved to my present location, which was then occupied [339] by the brother-in-law of the uncle who had set me up in the first business, and he moved to the location of the brother-in-law who had moved to Hayward.

Q. So you continued on in business at 10th and Broadway, is that right?

A. 1026 Broadway. It's closer to 11th street.

Q. And that was a joint enterprise between you and your uncle, is that right?

(Testimony of Milton H. Olender.)

A. No, that was my own business at that time.

Q. That was your own business?

A. I had paid my uncle or my father had paid him rather, for the 8th Street store.

Q. Did your father come up and take part in the business with you?

A. Oh, he used to come up here three or four times a year. He stayed at my home every time he came up. He came in the store and helped me.

Q. In other words, another reconciliation was effected between you and your father, is that right?

A. Oh, yes.

Q. Well, at that time did he tell you that he owed you any money or anything like that? Will you develop to his Honor what your financial transactions were with your father?

A. Well, he had—— [340]

The Court: As of what date?

Mr. Hagerty: After the start of this store at 10th and Broadway and where his father had advanced funds for him to take over the entire ownership.

A. Well, my father——

Mr. Drewes: What year was this, please?

A. Well, I don't know what year Mr. Hagerty is speaking of either.

Q. (By Mr. Hagerty): When you moved from 8th and Broadway to 10th and Broadway.

A. 1928.

Q. And took your uncle's interest in the store over, when would you fix that point of time?

A. Well, it would be 1928 when I moved to 10th

(Testimony of Milton H. Olender.)

and Broadway. I didn't take over his interest. I just moved my merchandise from 8th and Broadway to 11th and Broadway. That was my store. It wasn't his. He had no interest in it whatsoever.

Q. Now did you have any further financial transactions with your father at or about that time?

A. Not until 1930.

Q. Where did you get the money to start this store at 10th and Broadway?

A. That money came when he purchased the store through a sales contract with my uncle in 1928. I believe the purchase price was \$7,000 and he paid down somewhere between [341] five and six on it, and I paid out the balance within a year.

Q. And that store became a sole proprietorship vested in you? A. That's right.

Q. Were you a tenant in that building at that location? A. At 11th and Broadway?

Q. Yes. A. Yes, sir; I was.

Q. Did you ever change your status from tenant to owner? A. No.

Q. Did you attempt to? A. Yes, I did.

Q. Will you relate to his Honor and the ladies and gentlemen of the jury the surrounding circumstances of that event?

Mr. Drewes: Objected to as immaterial and irrelevant.

The Court: He may answer.

A. 1938, I believe, I went to the firm of Lionel Wachs and Company, who are the largest real estate

(Testimony of Milton H. Olender.)

people in Oakland, and they were representing, I believe, the Western States Life Insurance Company, who had had a mortgage on the building and had taken it over, and I made an offer to Mr. Lionel Wachs, and there is an affidavit which I believe will be presented in evidence by Mr. Lionel Wachs to that effect, that I offered him \$35,000 in cash in 1938 for the [342] building.

Q. Where were you going to get the \$35,000?

A. I had it.

Q. Where did you get it?

A. Fresno, in the vault.

Q. Was your father going to help you in this enterprise?

A. Oh, it was my money. It was my own money, I could have done whatever I wanted with it.

Q. Did the sale or the offer of purchase go through?

A. The offer was submitted and rejected, as being too low.

Q. Did you continue to see your father from that time on up until his death?

A. Right up to his death, yes, sir.

Q. Speak into the microphone.

A. I'm sorry.

Q. Did your father help you any—make any other gifts of funds to you in that period of time?

A. Just the \$5,000 each year from 1930 to 1940.

Q. Following your father's death did you go to—let me withdraw that. Where did he put these funds that he was giving you?

(Testimony of Milton H. Olender.)

A. In the vault in a safe formerly owned by me and to which he and I alone had the combination, in the Olender building. [343]

Q. And that is a vault which we have pictures of here? A. Yes, sir.

Mr. Hagerty: Again at this time, your Honor, I offer that picture of that vault in evidence.

Mr. Drewes: Objected to, your Honor, as irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Hagerty): You spoke of a vault and a safe, Mr. Olender. This safe, who had the combination to it?

A. My father and I only, no one else.

Q. You were the only ones that had it? [344]

A. Yes.

Q. Where had that safe come from?

A. That safe was my safe in the store at 1833-5-7 Tulare Street, and when I gave up the business and left, and my father had ultimately sold out that business, he took the safe over into the vault.

Q. You still have that safe?

A. No. My mother sold it after the estate was closed.

Q. How much money did you get out of that safe following your father's death?

A. \$75,000.

Q. And that was about when?

A. Sometime——

Q. What date? A. Sometime during 1942.

Q. What did you do with that money?

A. I brought it to the Bank of America, 12th

(Testimony of Milton H. Olender.)

and Broadway, in Oakland, and put it in my safe deposit box there.

Q. At that time did you have other funds in that box? A. I believe that I did.

Q. Who had access to that box?

A. At first only me.

Q. When did you first get that box?

A. I believe I got the box in '42. In fact, this morning the gentleman, if he had given you all the records, there is [345] a record of another box which I rented in 1942, and in 1943, as is in evidence I rented a larger box.

Q. You have reference to that "gentleman" Mr. Carroll?

A. Mr. Carroll of the Bank of America, yes.

Q. Following your father's death did you assist your mother in the direction of her business affairs?

A. Yes, I did.

Q. Did you continue so to do until the time of her death? A. I did.

Q. In that period of time did she make advances of funds to you? A. She did.

Mr. Drewes: If your Honor please, I had forgotten that Mrs. Widrin was in the witness room. She may be excused to return tomorrow. Will you so advise here, Mr. Clerk? I had forgotten.

Q. (By Mr. Hagerty): After you had the safety deposit box in the Bank of America at 12th and Broadway in Oakland with you and your wife, did you subsequently open another box there?

A. Yes, I did.

(Testimony of Milton H. Olender.)

Q. And for whom was that?

A. That box was a joint box with my mother and me.

Q. How did you happen to open it? [346]

A. Well, my mother and I were partners in all of our Fresno properties and I was handling those properties. I had all of the leases, all of the insurance policies, and all of the papers connected with the property, and when my mother came up in 1944 just a short time before that I opened that box, and she came up here to stay at my home while my wife and I went to visit my son in Denver who was then at the airfield in Denver, and she brought with her at that time \$20,000 in currency, and we opened the box and put that money in that box at the time.

Q. Did you ever have communications in writing from your mother in reference to the box and its contents?

A. I did. I had no particular use for that money. I had enough of my own at the time, though my mother brought it up here for me to use, and I so wrote her that I had no further use for it and what should I do with it, and my mother wrote me a letter in which she said if I had no further use for that money——

Mr. Drewes: Objection, your Honor, calling for hearsay testimony.

The Court: Sustained.

Mr. Hagerty: As a result of certain communications from your mother did you subsequently invest that money in Government bonds?

(Testimony of Milton H. Olender.)

A. I did. [347]

Q. Had you recommended to your mother any investment, in any other kind of security?

A. I had recommended to my mother that she should buy Bank of America stock.

Q. How did you happen to make that recommendation?

A. Well, I thought it was a very good stock, and I have good reason to justify that belief. I own considerable of it now and it is worth nearly twice what I paid for it.

Q. Did you discuss the matter at any time with Mr. Reinhard, the manager of the bank?

A. I certainly did, and he recommended it to me most highly.

Q. Did you ever borrow any money from your mother during this period of time, say the early forties and through 45 and 46?

A. From 1941, I believe, until about 43 or 4—I am not sure, I borrowed a total of \$33,500 which are on my books and show that sum and I repaid her by checks from my business which are on my books and which are reflected in her bank accounts, during the years 43, 4 and 5.

Q. Now, Mr. Olender, you just testified you had more than \$75,000 in cash in your own safety deposit box. Why would you borrow money from your mother?

Mr. Drewes: Objected to as calling for the opinion and [348] conclusion of the witness.

The Court: Overruled.

(Testimony of Milton H. Olender.)

A. My mother and my father came from Russia, a country we still think very much of. They were persecuted over there and they came to America, a free country, and gave them an opportunity to become very wealthy, and in their early days they knew abject poverty, as I did as a child, and my mother said to me when I had this money, "Milton, don't touch that. I have all the money you need. I don't need any. Anything that you need I will lend you. You can repay it to me whenever you wish. Just leave that \$75,000 there as a nest egg and if the time should ever come that you do need it, you have got something you can fall back on."

Q. In the latter period of your father's life and that of your mother's life did they have income in excess of their needs, the way that they lived in life?

Mr. Drewes: Objected to as the conclusion of the witness.

The Court: Overruled.

A. They had one piece of property that netted them \$20,000 a year above all expenses.

Mr. Hagerty: Where was that piece of property located? A. Los Angeles. They also——

Q. What type of property is it? [349]

A. It is an office building and businesses on the lower floor. They also owned the Olender building in Fresno, one-half of it. I might add that the Los Angeles property which netted them \$20,000 a year was solely their property, not a partnership property, but the Fresno property, all Fresno property,

(Testimony of Milton H. Olender.)

was partnership and they had half of the income which I don't know, five or six thousand dollars a year was their share, and they owned a ranch or two, and a house or two, and they paid no rent whatsoever. My father built—when he built the Traveler's Hotel in 1916, he built a cottage or a—I don't know,—a little house up on top of the building which is still there, and which was occupied by both of them, and then subsequently by my mother until her death. They had free light, water, garbage, telephone, and everything that was with it, as part of the lease of the building to the people who leased the building from them, and about the only expenses they had was food and clothing. [350]

Q. Did your mother in the last years of her life renew her offers of loans and gifts to you of her funds? A. Yes, she did.

Q. Do you recall what year it was that you purchased the \$20,000 worth of bonds for your mother?

A. I believe it was in 1945.

Q. 1945. Was that the purchase made at the Bank of America through their staff at 12th and Broadway? A. Yes, it was. I am sure it was.

Q. At this time, Mr. Olender, I show you some books that are variously labelled, five in number. Do you recognize those books?

A. Yes, sir, those are the books of the Army and Navy Store for the years 1943 through '46, I believe.

Mr. Hagerty: At this time, your Honor, I would

(Testimony of Milton H. Olender.)

like to offer them in evidence, the books of the defendant's store.

The Court: They may be marked.

Mr. Drewes: I believe that the foundation isn't sufficient. I will object on that ground.

The Court: Well, these are the books of account; you are familiar with them?

A. Yes.

The Court: And they were maintained by whom?

A. My bookkeeper, Vera Manger.

The Court: Is she available? [351]

A. I believe she is.

The Court: These represent all of the books of account, including the cash book, the journal, and the ledger, and so forth?

A. These are the books which Mr. Root testified were in perfect order.

Mr. Drewes: Under whose supervision were they? I don't believe there is—may I ask that go out, that response, go out of the record?

The Court: The last statement may go out.

Mr. Hagerty: We will submit—we will agree that it may.

The Court: They may be marked.

The Clerk: Defendant's Exhibits H, I, J, K, and L in evidence.

(Books of accounts of Army-Navy Store, five in number, were marked respectively H, I, J, K, and L, defendant's, in evidence.)

Q. (By Mr. Hagerty): Now, Mr. Olender, di-

(Testimony of Milton H. Olender.)

recting your attention to the years, the war years, '42, '43, '44, '45, '46, you were operating your store then at 10th and Broadway in Oakland, the Army and Navy Store? A. Yes.

Q. How many employees did you ordinarily have in that store? [352] A. About three.

Q. Did you have those employees all during that period of time?

A. No, I changed one or two of them. It was very difficult at that period to get anybody in good health to be working in any store. The Government demanded that they be in war work of some type, and many of my employees received warnings, including my own stepson, and he had to leave my employ, though, he wanted to work there, and go out to the shipyards in Richmond and work.

Q. Your stepson? A. Yes.

Q. Did he go in the service?

A. He later went into the service, in the Marine Corps, and went overseas.

Q. You had another son that was in the service?

A. Yes, he was in the Army Air Corps as an aviation cadet, and after many hours of flying before he was washed out.

Q. Well, did that require you to do most of the work around the store yourself?

A. Yes, it did.

Q. Did it tend to impair your health at any time? A. It did.

Q. You were under doctor's care?

A. I was. [353]

(Testimony of Milton H. Olender.)

Q. Directing your attention now to the year of 1944, along about the month of April, did you at that time contemplate a trip to visit one of your sons at a Texas air field? A. I did.

Q. San Antonio?

A. I went to visit my youngest son at San Antonio, Texas.

Q. Did you also have a business prospect in line there? A. I did.

Q. What was that, will you tell the ladies and gentlemen of the jury?

A. There was an Army and Navy Store in Texas, the proprietor was in ill health and he wanted to get out of business, and I had learned of it through a salesman who had come into the store, and he described the type of merchandise that this man had.

Mr. Drewes: Object to this recital. Seems to be immaterial and irrelevant.

Mr. Hagerty: This is preliminary, your Honor.

The Court: Go ahead.

Q. (By Mr. Hagerty): Well, acting on certain information you received as to the availability of an Army and Navy Store in San Antonio——

A. That's right.

Q. ——did you make any business preparations for that trip there? [354] A. I did.

Mr. Drewes: Objected to as a leading question. Counsel has been leading this witness.

Mr. Hagerty: All right.

Mr. Drewes: Consistently leading.

(Testimony of Milton H. Olender.)

The Court: I suppose you are leading up to the safe deposit incident?

Mr. Hagerty: That's it.

The Court: All right.

Q. (By Mr. Hagerty): Directing your attention to your safety deposit box in which you had this large sum of currency that you testified to. Did you change the names or the tenancy on that safety deposit box before you made this trip to Texas?

A. I did.

Q. What did you do?

A. I went to see my attorney, Monroe Friedman, and told him that I was going on this trip. I mentioned the possibility of me needing some money from this vault. I asked him to go down to the vault with me to sign on the box with me and I would remove the name of my wife from that box, and during the period that I would be gone he would be the sole person that could enter that box.

Q. Did you tell him anything about your contemplated business dealings in San Antonio? [355]

A. I did. I told them that I had the prospects of buying some merchandise there, a store, and that I was taking some cash with me, but that I did not know just how much I needed; that if I needed more he was to go to the box and buy a cashier's check and send it to me.

Q. Had you taken any currency out of this box in preparation for this trip before you brought Monroe Friedman to look at and examine the contents of the box? A. I did.

(Testimony of Milton H. Olender.)

Q. How much had you taken out then?

A. Somewhere between five and ten thousand dollars. I don't remember the exact amount.

Q. And it is your testimony that you were taking that sum with you and if you needed more you would send to Monroe Friedman to get it from the box?

A. That's it.

Q. Now, this was in about April of 1944; is that true?

A. Yes, sir.

Q. Subsequently, directing your attention to about the year 1948, at about the time that you received a call from Mr. Root, the Bureau of Internal Revenue, and about the time you dealt with Mr. Ringo, and he prepared a working statement of your affairs, did you go to see Monroe Friedman, the present Judge?

A. I did. [356]

Q. Then can you fix the date about of that visit?

A. Well, it would be some time between the time that Mr. Ringo was working on the net worth statement, which probably would have been April or May he started—it would probably be June, July or August, some time in there.

Q. I show you defendant's Exhibit D in evidence and ask you if you recognize it?

A. I do.

Q. What is it?

A. This is the affidavit of Monroe Friedman as to our dealings on the safety deposit box during April and May of 1944.

Q. Will you relate the circumstances that

(Testimony of Milton H. Olender.)

brought about the execution of this document by Monroe Friedman?

Mr. Drewes: I am going to object to that as calling for a recital.

Mr. Hagerty: I can shorten it up, but I don't want to lead him.

Mr. Drewes: I suggest that specific question be asked.

The Court: You may proceed.

Mr. Hagerty: I may lead him a little bit?

The Court: Yes.

Q. (By Mr. Hagerty): In reference to this affidavit, when you went to see Monroe Friedman did you tell him that—did you call to his mind that he had been made a party—as a tenant in common on your box, or did he remember it and recall [357] it to your mind?

Mr. Drewes: Objected to, your Honor, as calling for hearsay. The understanding from counsel is that Judge Friedman if called to testify would testify in accordance with the stipulation which is on file, and obviously any reference to what transpired at that time must necessarily be entirely a recital.

Mr. Hagerty: It is still his testimony.

The Court: I think in the light of the stipulation I will sustain the objection.

Q. (By Mr. Hagerty): Well, in all events, Mr. Olender, as a result of your conversation with Mr. Friedman, the present judge, this affidavit was executed; is that true? A. That's true. [358]

(Testimony of Milton H. Olender.)

Q. Wherein he details the counting of funds?

Mr. Drewes: Objected to, your Honor. The stipulation stands by itself; it speaks for itself.

The Court: It details the counting.

Mr. Drewes: It has been read to the jury.

The Court: The amount of money in the box is set forth?

Mr. Hagerty: Yes.

Q. Upon your return from Texas—let me withdraw that. When you got to San Antonio, did you buy the store?

A. I did not. I, as in another affidavit in this case, I missed the boat. I was too late.

Q. Had you intended to start a store and stay in San Antonio? A. Oh, no. No.

Q. What was your idea in trying to make such a purchase?

A. Well, I could have—the information I received told me that the merchandise was the type of merchandise that I used in my store and at that time it was almost impossible to obtain brass, metal ornaments, cap ornaments, every type of insignia which was a major item in my store, and when I heard that this particular business was loaded with it, I saw an opportunity to get something that others didn't have.

Q. Upon your return to Oakland following this trip to Texas, did you again change the notation on the safety deposit box? [359] A. I did.

Q. What did you do?

A. I took Mr. Friedman off the box after he,

(Testimony of Milton H. Olender.)

as he states in his affidavit, had checked it to see that it was in the same condition that it was when we had gone into it, and I put my wife back on it.

Q. Now during this period of time, that is, the war years and particularly '45 and '46, did you have any dealings with the Money-Back Smith Company?

A. I had many transactions with them.

Q. Could you indicate some of those transactions on your books for us?

A. I could if the books are shown to me.

Q. What were the transactions?

Mr. Drewes: Objected to; immaterial, irrelevant.

The Court: Overruled.

Q. (By Mr. Hagerty): What were the transactions?

A. Well, they were purchases made by me during the years 1944, 1945 and 1946. Some of them made by cash and some of them made by check, but all recorded on my books and on Money-Back Smith's books.

The Court: Do they enter into the counting at all?

Mr. Hagerty: Yes, they do.

The Court: Into your accounts?

Mr. Hagerty: Yes, they do, because the transaction was [360] shown as purchases and then in accounts payable. It was a mistake. The things were paid already for by cash by him and they shouldn't have been shown as a liability on the

(Testimony of Milton H. Olender.)

books, and we will point out those errors when the accountant takes the stand.

The Court: How do they enter into the books? Do they affect the stipulation already entered into?

Mr. Lewis: Yes, they do, your Honor. It shows one error in the stipulation, to this extent: they had already been paid in cash and they were entered in accounts payable account, and so the liabilities he had already paid Money-Back Smith for them and they did not make the entry into his investment account for the year 1944, but it just shows as an account payable, and it should have been a contribution to capital in the year 1944. Now we can delay that matter until morning, your Honor, and put the accountant on the stand and perhaps he can explain it better than Mr. Olender could.

Mr. Hagerty: It has a definite bearing on the net worth feature to the extent of those purchases.

The Court: I suggest you reserve that for the accountant and then the Government may examine the accounts so that they may be equipped to examine the accounts. Is this the first indication you have had of this matter?

Mr. Drewes: Yes, your Honor.

Mr. Lewis: As a matter of fact, your Honor, we did not [361] find it ourselves until Sunday.

The Court: All right.

Q. (By Mr. Hagerty): These purchases that you made from Money-Back Smith & Company, Mr. Olender, what were they, what was the nature of them, what kind of goods were you getting?

(Testimony of Milton H. Olender.)

A. Well, they were goods that weren't easy to get. Money-Back Smith had buyers in New York, all throughout the East, and I had nobody but myself, as Mr. Lorenzen has testified, they received merchandise which, as the name implied by Money-Back Smith, that if it wasn't satisfactory perfectly they would replace it or give him money back. I went to Money-Back Smith, and I could use merchandise of that type. They were underwear, hosiery, shirts and sweaters. The invoices would show what they were. I don't remember just what the specific items were. There were many, many of them.

Q. The lots that you would buy, were they of great quantity or small?

A. Well, there would be maybe a hundred dozen of something, which might be three dollars a dozen or five dollars a dozen. If it was hosiery, or five dollars—underwear at five dollars a dozen, which would be \$250 or so. Very few of the invoices ran over \$500.

Q. Mr. Olender, a great deal of evidence has come in here in reference to some securities that you purchased which became [362] of questionable value. Would you tell his Honor and the ladies and gentlemen of the jury how you happened to buy that stock originally?

A. The Asturias Corporation was started by two men, Rodney Asturias, Mr. Ben Neiden, who testified here this last week in regard to the stock. It

(Testimony of Milton H. Olender.)

was a doubtful proposition made from the very beginning. [363]

Mr. Drewes: Object to this, your Honor, as immaterial, irrelevant, how he came to buy this stock, whether it was doubtful or not. The question is that he bought the stock or he didn't buy the stock.

The Court: Overruled.

A. Mr. Neiden at that time—not at the present time—was married to the daughter of my uncle, a lifelong chum, who passed away when his daughter was a very little girl.

Q. (By Mr. Hagerty): At any rate, Mr. Olender, you knew the people? A. Yes.

Q. You believed in them and you bought the stock; is that right? A. That's right.

Q. And subsequently did you have any falling out with them over the stock or anything like that?

A. Oh, I had quite a quarrel before the purchase of the second, or the loan—I won't say "purchase"—it was a loan. At that time I knew that we were being taken and I told that to Mr. Neiden at the time, and he made the remark to me that "if it wasn't for your father you wouldn't have anything."

Mr. Drewes: Objected to as hearsay, your Honor.

Mr. Hagerty: We'll move to strike that.

The Court: Sustained. It may go out. [364]

Q. (By Mr. Hagerty): But the second transaction of \$5,000 with this firm was not in its inception a purchase of stock? A. It was not.

(Testimony of Milton H. Olender.)

Q. Will you just tell his Honor and the ladies and gentlemen of the jury just the conversations that occurred at the time that you made this transaction, the second transaction?

Mr. Drewes: I will object, your Honor, if it calls for conversations. Hearsay testimony is being required, apparently.

The Court: Sustained.

Q. (By Mr. Hagerty): You advanced money to the corporation; is that right?

A. That's right.

Q. Was Mr. Horne present at that time, the accountant?

A. I wouldn't be sure of it. But I believe Mr. Horne was present at all of the meetings of the Asturias Corporation. The minutes will show whether he was present or not. They state everyone who was present.

Q. I show you a letter here written by Jefferson E. Peyser, and ask you if you recognize it?

A. I do.

Mr. Hagerty: At this time, your Honor, I offer this letter in evidence. Government counsel has seen it. [365] It has reference to the shares of stock.

The Court: It may be marked.

The Clerk: Defendant's Exhibit M in evidence.

(Thereupon letter from Mr. Peyser received in evidence and marked Defendant's Exhibit M.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): On the second advance of \$5,000 to the Asturias Corporation, after paying the money how long was it before you received the shares of stock?

A. I received the shares of stock on January the 2nd, 1948.

Q. When had you made the advance of the \$5,000?

A. With the Court's permission, I should like to correct an error in the net worth statement, because it has been called to our attention by Mr. Whiteside——

Mr. Drewes: Objected to, your Honor. A question was asked and a response is expected.

Q. (By Mr. Hagerty): You will have to answer the question, Mr. Olender. We will bring that out later.

A. All right. What was the question?

Mr. Hagerty: I will withdraw the question and reframe it. When did you make the payment of the \$5,000, the second \$5,000, to the Asturias Corporation?

A. I believe it was in December of 1946. That was a loan.

Q. That was a loan? A. Yes, sir. [366]

Q. Was it subsequently converted into an investment in the securities? Of that concern?

A. I wouldn't know. I didn't get the stock until 1948.

Q. Well, was it by and with your permission

(Testimony of Milton H. Olender.)

that this loan that you made to them was converted into an investment in their capital?

A. It wasn't with my permission, no.

Q. How did they happen to? Let me withdraw that. This letter that has been offered in evidence, here, apparently written by Mr. Peyser, how did he happen to send you some shares of stock in the company?

Mr. Drewes: Objected to as calling for the opinion and conclusion of the witness.

The Court: Overruled.

A. Well, when the company looked like it was broke I believe somebody suggested that the best way to collect on the thing, if you were going to put in, it in the income tax return as a loss, is to have it in the form of shares of stock and then the Government would rule on the fact that it was valueless and could then take your loss. But I do know that the stock was, as the minutes will show, was ordered to be purchased at least a half a dozen times and before it ever went to the board the company was declared absolutely bankrupt and when they sent us the stock they were just sending us wallpaper. [367]

Q. (By Mr. Hagerty): I show you here, Mr. Olender, some various sheets marked "inventory." Do you recognize them? A. I do.

Q. What are they?

A. They are the inventories at the end of 1944, '45 and '46 of the Army and Navy Store.

Mr. Hagerty: At this time, if your Honor

(Testimony of Milton H. Olender.)

please, I would like to offer as Defendant's Exhibit next in order these inventories of the Army and Navy Store.

Mr. Drewes: It is objected to, your Honor, on the grounds as immaterial and irrelevant and also covered by the stipulation.

Mr. Hagerty: They are preliminary, your Honor, in that they will tie into one of the transactions that is in question. That is the Goodman transaction involving several suits, Navy suits that were found unmerchandisable.

The Court: I see reference made in the stipulation to the item "merchandise inventory \$85,011.26, December 31, 1944," and the tape reflects the same. For that limited purpose I will allow them, however.

Mr. Hagerty: Just to show we had an entry for that transaction I suggest they be marked for identification.

The Court: They may be marked for identification.

Mr. Drewes: Until there is further testimony and we see precisely what it is, that is, what they intend to show [368] by them.

The Court: They may be marked for identification.

The Clerk: Defendant's Exhibit N for identification only.

(Thereupon the inventory sheets marked for identification only Defendant's [368-A] Exhibit N.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): I show you an invoice, Mr. Olender, on the firm name of M. Saraga. Do you recognize it? A. I do.

Mr. Hagerty: At this time, your Honor, I would like to offer this invoice into evidence as the defendant's exhibit next in order.

Mr. Drewes: May I suggest the foundation be more completely laid?

The Court: What is this item?

Mr. Hagerty: That is in reference to merchandise purchased by the defendant from the witness Saraga, your Honor, to the transactions that were purported reflected in the Government's Exhibits 40, 40A and B, and there were various checks received from Mr. Saraga that are in evidence. It refers to the transaction that went on between the defendant and that witness and has a direct bearing upon the business practices and the net worth.

Mr. Drewes: We object on the grounds of immateriality. I ask for a more complete foundation. Where did the record come from, whose record is it? Counsel simply asked him if he recognized it. He asked the witness. The witness said that he had.

Q. (By Mr. Hagerty): Is that your bill?

A. That is a bill sent to me by Mr. Saraga for the purchase of 1,000 sailor suits. [369]

Q. This was taken from your records?

A. From my invoice records, yes, sir.

The Court: From your records?

A. Yes, sir.

The Court: I will allow it.

(Testimony of Milton H. Olender.)

The Clerk: Defendant's Exhibit O in evidence.

(Thereupon invoice, Saraga, received in evidence and marked Defendant's Exhibit O.)

Q. (By Mr. Hagerty): Now, Mr. Olender, at or about the first of the year 1944, January, 1944, did you enter into any transaction with a Mr. Goodman, George Goodman, in New York?

A. Not directly with Mr. Goodman, no.

Q. Through the offices of Mr. Levy?

A. Yes, through Mr. Levy.

Q. As a result of those negotiations, did you withdraw certain funds from your safety deposit box in the Bank of America?

A. I withdrew \$20,550.

Q. What did you do with those funds?

A. I bought about four or five cashier's checks, made out under Mr. Levy's direction to Mr. George Goodman, whom I had never met and didn't know.

Q. Did you purchase some merchandise, Navy uniforms, from—

A. Mr. Levy secured those suits for me through Mr. Goodman, and where Mr. Goodman got them, I don't know.

Q. I show you Government's Exhibit 25, "Olender, Cash on Hand [370] and in Banks" and there is an entry here—"The following sums were expended from cash January 10, 1944, three cashier's checks to Goodman amounting to \$2250 each; January 22, 1944, three cashier's checks to Goodman at

(Testimony of Milton H. Olender.)

\$2250 each; January 22, 1944, three cashier's checks at \$2350 each to Goodman."

Does that refer to this transaction you had with Mr. Goodman? A. I believe it does.

Q. Now, the uniforms you received from him ultimately were they or any part of them ever reflected in Defendant's Exhibit M, your inventory sheets, for the periods of '45-'46?

A. As of January the 1st, or December 31st, 1944, or January 1st, 1945, they were not reflected.

Q. Were they—

A. As of January the 1st, 1946, some \$8,000.00 of them were reflected, and in 1947 that had gone down to about \$2,000.00.

Q. You were present and in court at the time that the witness Whiteside was on the stand and made the statement that there was no entry in your books on the Goodman transaction. Will you show his Honor the entries in these entries relating to the Goodman transaction?

A. I don't remember what page whose were on. Didn't you have a notation or something about that?

Q. I don't know—

Mr. Lewis: Page 45. [371]

The Court: Will you look it over at the recess? and you find it. Is this the only instance where the Goodman transaction appears?

Mr. Hagerty: I believe it is.

A. Just a moment. I think I can find it.

The Court: Will you look it over at the recess?

A. I think I can find it. Just a moment.

The Court: We will take the adjournment till tomorrow morning, 10:00 o'clock, and the same admonition to you, not to discuss the case under any circumstances or conditions and not to form an opinion until the matter is submitted.

(Thereupon an adjournment was had until Tuesday, September 23, 1952, at 10:00 o'clock a.m.) [372]

September 23, 1952—10:00 A.M.

The Clerk: United States vs. Olender, on trial.

(The following proceedings were had outside the presence of the jury:)

Mr. Drewes: If your Honor please, subsequent reflection and research has convinced the Government that its questions propounded to the character witnesses heretofore by the Government were entirely proper.

(Authorities submitted and further argument in support thereof.)

Mr. Hagerty: This is our position, your Honor, maybe it is already moot, we don't intend to call any further character witnesses, unless the Government intends to call back the witnesses we have had.

Mr. Drewes: Your Honor, the matter then becomes moot, if no further character witnesses are going to be called. I have no intention of bringing the witness back.

(Further discussion.)

Mr. Drewes: With Mr. Hagerty's assurance that no further character witness will be called, the question becomes moot. I have no intention of recalling witnesses who have already testified.

Mr. Hagerty: We had one character witness that we had under subpoena but apparently he isn't going to appear and we [373] will not push the subject too far. We have accomplished our ends already, I think.

The Court: Call the jury in.

Mr. Drewes: If your Honor please, one further matter that I wish to take up at this time, before the jury is called in.

The Court: While we are here, while we have a few moments, on those checks relating to 1920-21, have you examined those checks?

Mr. Drewes: Yes, I have examined them. I am of the opinion they support nothing whatsoever. They are irrelevant, immaterial, remote.

As your Honor knows, there is in the record a stipulation entered into by opposing counsel in this matter. The first section deals with the assets and net worth of the Army and Navy Store. That stipulation was entered into Friday last before the trial, after much opportunity, plenty of opportunity for all necessary investigation and studies to be made. I might also state that the inventory figures came from the taxpayer's returns filed with the Bureau of Internal Revenue, and the other figures, for the most part, came from the working papers of the taxpayer's only accountant.

Now I have examined the record of yesterday's

proceedings, your Honor, and it appears therein that at least three separate attacks have been made upon the stipulation. One [374] was the check in the amount of \$1,000.

The Court: That has been explained now. I think the stipulation covers checks that were not cleared. I think that check is entirely irrelevant in the light of the stipulation.

Mr. Lewis: Your Honor——

Mr. Drewes: May I finish first? There are two or three other matters.

The Court: All right.

Mr. Drewes: The second apparent attack is to be found in the testimony of the representative of Money Back Smith who testified during 1944 he had made certain cash sales to the defendant Olander. Now at the time that I objected I understood counsel for the defense to state that it appeared in further examination, from further examination that those papers had somehow been improperly handled in the books of the defendant, having been entered, instead of cash purchases, as accounts payable, which would tend to inflate liability and thus understate net worth as of 1944.

The third such attempt appeared to me to be the testimony which they sought to elicit from the inventory records themselves of the defendant in the closing moments of the trial. The purpose of that attempt appears to be to increase the amount of the inventory on hand.

The Court: Under the Goodman [375] transaction?

Mr. Drewes: Under the Goodman transaction. Now I submit, your Honor, that those all appear to be attempts to impeach the stipulation, and at the very least they will tend to create questions in the minds of the jurors as to the validity of this stipulation which was entered into, as I say, fully and freely and after plenty of opportunity to make any investigations that were necessary.

I want to take this opportunity to call that to the attention of the Court, to emphasize that we consider the matter of great importance, and also at this time to move that the testimony of the witness, the representative of Money Back Smith, whose name escapes me, with particular reference to his transactions of 1944 with the defendant, be stricken from the record. The record shows that you reserved your ruling on that matter. The witness was Mr. Lorenzen.

Mr. Lewis: Your Honor, taking up the first statement of Mr. Drewes, about the cash in bank net after outstanding checks. Now that means, and I will bring a public accountant here who has worked for the Bureau of Internal Revenue for a period of five years, who will testify that this reconciliation "Net after outstanding checks" was that they deducted from the amount in the bank at the end of the year all the outstanding checks. Now Mr. Olender happened to have this one check which was deducted from the amount in the bank at the [376] end of the year in his own pocket and cashed it in January of the following year.

So it was in the same position as cash in his pocket at the end of 1944.

The Court: The clearing house stamp shows January 10.

Mr. Lewis: January the 10th.

The Court: That is correct.

Mr. Lewis: That is correct. But it was deducted from the——

The Court: Will you sit down, please?

Mr. Lewis: It was deducted from the outstanding checks or from the bank account as if it was to someone else and not to Mr. Olender.

The Court: I see your point.

Mr. Lewis: Now on your second item, which I believe was the Smith purchases. We propose to prove there were a few thousand dollars worth of Smith purchases for cash previous to May the 5th, 1944, that were paid for by the defendant by cash and yet the books showed that that was still an account receivable. Now that, your Honor, I admit—or account payable.

The Court: Account payable. In other words, that the company owed Smith.

Mr. Lewis: That Olender owed Smith. Now that——

The Court: When in truth and in fact he paid cash. [377]

Mr. Lewis: He had paid cash for that.

The Court: That would increase the net worth.

Mr. Lewis: That would increase the net worth.

The Court: As of 1944.

Mr. Lewis: That is correct.

The Court: All right.

Mr. Lewis: Now, on your next item, the purpose of proving the inventory in the Saraga and Goodman transactions, we are not trying to change one dollar of the merchandise inventory but we are going to prove that out of the \$20,500 worth of checks that had been testified were given to Goodman—Leavy-Goodman—those cashier checks in January, 1944—we are going to prove that he had that inventory—there has also been testimony about the sales to Lerman, there has been testimony about the other sales that Leavy made, and those were wholesales, and we are going to prove that when that was all washed out that the defendant had a certain number of those suits left and he put them in the inventory and marked them into inventory as from this transaction and that they are included in the amount in the stipulation. We are not trying to change the stipulation one iota as to the amount of the inventory.

The Court: Your point is that you are trying to explain the stipulation in the light of the inventory items.

Mr. Lewis: That's right. In other words, the Government [378] has implied that this—

The Court: The Government has charged that those transactions—we will call them the Goodman transactions—did not find their way into the books in any manner at all.

Mr. Lewis: That's right.

The Court: Your position is that they did find their way in part, at least, into the inventory.

Mr. Lewis: The extent of the testimony will be that there was \$8,500 worth of those suits—the exact number of suits—that went into inventory, and at the end of the year I think it was seventy-seven hundred and some odd dollars was still on hand but that they were on hand in 1944 also, but they were not included in the inventory of the store. He kept them out of the inventory of the store because he was trying to return them or sell them at wholesale because they were not the right kind of uniforms for his type of operation.

Mr. Drewes: So the last offer in connection with inventory is not——

Mr. Lewis: Does not change the net worth.

Mr. Drewes: Does not change the net worth.

Mr. Lewis: That's right.

Mr. Hagerty: No.

Mr. Lewis: No, the Goodman transaction—it is to trace the \$20,500 clear through. See.

Mr. Drewes: Very well. [379]

The Court: I think I understand your position, counsel.

Mr. Drewes: I will renew my motion to strike the testimony of the representative of Money Back Smith, Mr. Lorenzen, on the grounds——

The Court: I will deny the motion. With respect to the stipulation, the position of the Court will be that—I think it is consistent with the trend of the testimony—that explanatory notes may be made concerning the matter as illustrative, if any of the merchandise did get into the inventory. It is a note of explanation, at least, on the part of

the defendant. I think that is permissible and should be engaged in.

Mr. Lewis: That is all we intend to prove, your Honor.

The Court: The other phases of the Goodman transactions are still in the state of flux. I mean they are still fluid in my mind, at least. I haven't been able to follow them out.

Mr. Lewis: The only testimony that we have in the record on the Goodman transaction thus far is that those checks totalling \$20,500, the purchase in cash in January, 1944, were given to Mr. Goodman for the purpose of purchasing suits, and that he did eventually—the suits come out—it is all tied in with the Saraga testimony, that they had given here, and tracing those points, and, of course, it will be our contention that those funds are still on hand at [380] the end of 1944, although they are outside of the stipulation, outside of the inventory, and were never taken into inventory and never included in inventory and never made until he had disposed of all that he could at the wholesale price, like through Mr. Lerman and the suits that Mr. Leavy testified that he sold.

The Court: I think I understand your position on that.

Now with regard to the checks relating to the period of time of 1920-21, I have given rather serious thought over the night to those checks and to the field that you intend to go into, and I think clearly the Government is correct in its contention that the subject matter thereof is remote and

irrelevant to the controversy at bar. Accordingly I will sustain the objection entered with respect to those checks.

Mr. Drewes: Your Honor, I understand your Honor has clearly in mind with respect to the Money Back Smith evidence, that the purpose there is to show that the liabilities figure in the stipulation is overstated because there are accounts payable there which should not be?

The Court: That is my understanding.

Mr. Drewes: You are going to admit that testimony?

The Court: Yes.

Mr. Drewes: To impeach the stipulation.

The Court: It isn't impeaching the stipulation. Let us [381] assume that the Government and the defendant, as they did in the case at bar, entered into a stipulation with all of the formalities attendant upon such enterprise and they find, either the Government or the defendant, that there is an inaccuracy, an arithmetical inaccuracy, an inaccuracy of bookkeeping consequence, that in truth and in fact the accounts payable should have been \$10,000 more or less as it may appear through an error that may be explained in the light of testimony offered under oath. I think the Court would be in error in not permitting counsel on either side to reopen the matter to the extent of explaining the stipulation.

Mr. Drewes: I would certainly agree with your Honor as far as arithmetical error is concerned, but when after——

The Court: I assume at some stage, and I can only project my thinking to the end that I assume at some stage an accountant will get on the stand, representing the defendant, and state that upon his analysis an examination of the books of account he finds that the item of, let us say, \$10,000 should not be registered in the accounts payable as of a given date, for as it appears that the defendant allegedly or assertedly paid in cash. Now it is a question, it is to be a question of credibility in the final instance whether or not the defendant did pay in cash. If he did pay in cash, there must be some receipts therefor. [382] If he did pay in cash, the person to whom he paid the money will certainly remember the situation. If it is a question of fabrication, the Government is entitled to go into it.

Call the Jury in.

Mr. Lewis: Your Honor, before the Jury comes in, I would like to show you Schedule 2. I have already given a copy to the Government. If there is objection later, it will be all right, but I thought you should have it. (Handing document to court.)

The Court: The jurors are present, gentlemen. You may proceed with further trial.

Mr. Hagerty: Will you take the stand, Mr. Olender?

The Court: Mr. Lewis has handed me certain schedules as to the analysis of the Saraga transactions and also an analysis of the Goodman transaction. You have copies?

Mr. Drewes: Yes. We just received them.

The Court: You may proceed.

Mr. Hagerty: We also made copies for the jury, too.

MILTON H. OLENDER

the defendant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Olender, please restate your name for the record? [383]

A. Milton Howard Olender.

Direct Examination
(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, yesterday in your testimony you told us about some checks totalling \$20,550 that through the agency of Mr. Leavy you had sent on to a Mr. Goodman in New York for certain sailor's uniforms. Can you give us the details of that transaction?

Mr. Drewes: Objected to, calling for a recital. Ask that the witness be questioned in the usual fashion.

Q. (By Mr. Hagerty): Mr. Olender, did you receive the uniforms as a result of those checks that you gave to Mr. Goodman? A. I did.

Q. Did the uniforms correspond with your specifications? A. They did not.

Q. What was wrong with them?

A. I ordered sizes 34's, 35's, 36's and 37's, which is the average size of 90 per cent of the sailors

(Testimony of Milton H. Olender.)

who are in the service—were at that time. I received no 34's, 35's, 36's or 37's. I received suits marked with those numbers on them but the 34's were 38's, the 35's were 39's, the 36's were 40's, and the sizes went up as high as 44's. And it is almost impossible to sell sailor's suits of that size unless you have a tailor right in your establishment who can cut them down, and I didn't run that kind of a store that wanted to misfit a [384] sailor.

Q. Well, what did you do with this quantity of uniforms?

A. Well, I immediately complained to Mr. Leavy about them. He said he would see what he could do about them. I just put them down in my basement and watched to see what would happen.

Q. Did you take them into your books, in your inventory books? A. I did not, in 1944.

Q. What disposition did you make of those uniforms?

A. Well, in about June of 1945 Mr. Leavy told me that he knew where he could dispose of 200 of those suits and if I would send them over to him he would dispose of them. I had no idea of whom he was selling them to and he returned the cash for those 200 suits, some \$5,000, to me, which I deposited in my store account.

Q. What happened to the remainder of the suits, do you recall?

A. Some time in the fall of 1945, July or August, Mr. Leavy had disposed of about 280

(Testimony of Milton H. Olender.)

suits, totalling around \$7,000, and he took that money with him to New York on a trip and gave that to Mr. Saraga as a deposit on suits for me, which Saraga did not deliver.

Q. Were those funds that were sent on to Mr. Saraga ever returned to you?

A. They were returned to me some time. They bounced—I [385] think there were four or five transactions in there. Mr. Saraga sent me a check postdated which, to the best of my recollection, I put through for collection, and when I got the check I believe I returned it to Mr. Leavy because Mr. Saraga told me that he could then sell me some suits, and it came back again—I think it came back three or four times. He never did deliver those suits to me and those funds were deposited in my personal account.

Q. I show you the Government's Exhibits Nos. 41 and 42. Are those checks which were returned to you by Mr. Saraga? A. They are.

Q. Did one of these checks bounce?

A. I believe it did. I don't know if it is one of those, but one of his checks bounced.

The Court: What do you mean by "bounced"?

A. I put it through the bank and it was returned "not sufficient funds."

Q. (By Mr. Hagerty): Was that a postdated check, do you recall?

A. I wouldn't be sure whether it was a postdated check that bounced or one of the ones that came to me later.

(Testimony of Milton H. Olender.)

Q. But after the check was returned to you, what did you do with it?

A. I put it finally into my personal account. Not all of it. I believe about \$7,000 of it. \$725, which was a refund on another deal that I had with Mr. Saraga, and which you have [386] the invoice there, went into my store account. It was on the books.

Mr. Hagerty: At this time, your Honor, I wonder if I might show these to the Jury, these checks.

The Court: Yes.

(Exhibits 41 and 42 passed to the jury.)

Mr. Hagerty: Mr. Olender, did you dispose of all of these suits or did you still have some on hand, the Goodman transaction?

A. I still had some 300 odd suits on hand at the end of 1945. I had sold perhaps 20 of them during the year in the store, and the balance, around \$7,900, that was carried on my inventory as of the end of 1945.

Mr. Hagerty: If your Honor please, since the defendant has testified, this much of the transaction, would it be all right if I showed these charts to the jury so they could follow the transactions as we are going through? It is rather difficult to hold these things and figures in mind.

The Court: Yes, I think so.

(Documents handed to the jurors.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Now, Mr. Olender, to recapitulate, for the benefit of the jury, you sent—looking at the large chart—you sent \$20,550 to Mr. Goodman in payment for certain uniforms, is that true? A. It is. [387]

Q. And you found those uniforms unmerchandiseable from your standpoint?

A. That is correct.

Q. And then you attempted to dispose of those uniforms on a wholesale basis, is that true?

A. That is true.

Q. And Mr. Leavy assisted you in that respect?

A. He did.

Q. You testified that he sold about \$5,000 worth of them? A. Yes, sir.

The Court: As you proceed, would it not be advisable, in the light of the jury having the chart before them, to explain as you go along what the left-hand side represents, what the right-hand side represents, and then take each step and go through it? These people are not accountants. They have not had the benefit of months of investigation.

Mr. Hagerty: The Goodman transaction we find starting in this left-hand column. The checks, the evidence of which was put in by the Government, in their Exhibit No. 24, I believe—

Mr. Drewes: That suggests to me, before counsel begins, would your Honor instruct the Jury that the chart is not evidence unless connected up?

The Court: Well, the chart is for purposes of illustration for the simple and obvious purpose of

(Testimony of Milton H. Olender.)

permitting you to [388] follow the evidence as it unfolds. Now this represents the theory of the defendant as to what the money represented and the proceedings and how it finally evolved.

Mr. Hagerty: That \$20,550, Mr. Olender, where did you get that money?

A. Out of my safe deposit box.

Q. And about what time?

A. The early part of January, some time in January, 1944.

Q. And with the cash funds what did you do?

A. I purchased cashier's checks made out to Mr. George Goodman at the suggestion of Mr. Leavy.

Q. And you turned those checks over physically to Mr. Leavy, is that true? A. I did.

Q. Subsequently did you receive the uniforms from Mr. Goodman?

A. I did, \$20,550 worth.

Q. And at that time, to repeat again, you found that you could not dispose of them, they were not for your type of operation, so you attempted to dispose of them on a wholesale basis?

A. That is correct.

Q. Did Mr. Leavy assist you in that operation?

A. He did.

Q. And what did he do? [389]

A. He sold 200 suits, to whom, at the time I didn't know, at my cost \$25 a suit.

Q. That would amount to \$5,000; is that true?

A. That is correct.

(Testimony of Milton H. Olender.)

Mr. Hagerty: That is indicated on the first line here from the right.

Q. Now you did not know to whom those suits were sold? A. I had no idea.

Q. Did you subsequently learn?

A. Only after this Government investigation started.

Q. And who was the man who purchased them?

A. Mr. Lerman.

Q. Who is Mr. Lerman?

A. Mr. Lerman was a competitor of mine just across the street from me in the same line of business.

Q. I see. Now how could he as a competitor of yours dispose of suits that you could not dispose of?

Mr. Drewes: Objected to as calling for the opinion and conclusion.

The Court: Overruled.

A. Well, Mr. Lerman also had a tailor shop in the back of his store and when a sailor came in to buy a suit, the tailor came up there, put the chalk marks on the suit, marked it up, went in the back of the shop and finished it up. I had no tailor in my establishment. [390]

Q. (By Mr. Hagerty): All right. Now the \$5,000 you received from Mr. Leavy in return for the sale to Mr. Lerman, what did you do with that cash item?

A. I deposited that in the bank account of the Army & Navy Store.

(Testimony of Milton H. Olender.)

Q. Did Mr. Leavy dispose of any other suits for you?

A. He disposed of some \$7,000 worth.

The Court: One moment. In order to follow that transaction through, you deposited in the store bank account the \$5,000 under date of June 19, 1945?

A. That is correct.

The Court: Now how was that credited on the books? I know here you have additional investment credited to the capital on the books.

A. It would naturally be credited as the capital investment. It is money put into my business.

Q. (By Mr. Hagerty): Then following the next transaction that is shown on the chart, did you keep certain suits yourself and finally take them into your inventory? A. I did.

Q. About what would you say the cash value of those suits were that you took into your inventory? A. \$7,900 plus.

The Court: Were those 342 suits unsold?

Mr. Hagerty: Yes. That is what I had. [391]

A. Yes.

Mr. Hagerty: Yes.

The Court: Why not adopt the exact figures you have here? You say, "\$7,900." The chart states \$8,550.

A. Well, there were other suits besides those on my inventory. I had purchased other suits besides them and they were also on the inventory but they are shown separately from these suits. These particular Goodman suits are shown as

(Testimony of Milton H. Olender.)

\$7,900. There are two other items of sailor's suits.

Mr. Drewes: I object to this and ask that it be stricken, your Honor. The record speaks for itself.

The Court: It may be stricken. I am being guided now as we go along by the chart in front of me. I can't follow any other phase of it.

Mr. Hagerty: Maybe I should show the witness the chart, too, so he could have it. It's pretty difficult to keep all the figures in mind. Probably the best way, your Honor, might be just to ask the witness to explain the chart. As he goes through he can outline the transaction.

The Court: You take them up with the witness step by step so I can follow them. I assume if I can follow them, the Jury can follow them.

Mr. Hagerty: All right.

Q. Mr. Olender, you just described the Leavy transaction to Mr. Lerman, wherein \$5,000 worth of suits were sold, which [392] cash item you put back into your capital investment into your Army & Navy Store. Now, let's move to the next transaction on the chart. Right below it on the left-hand side is a figure of \$8,550 and the statement of 342 suits unsold by Leavy.

Mr. Drewes: Your Honor——

Mr. Hagerty: What did he do?

Mr. Drewes: May I object here as there is no evidence in the record that any number of suits remains unsold.

(Testimony of Milton H. Olender.)

Mr. Hagerty: I think I have asked him several times.

Mr. Drewes: It was just stricken.

Mr. Hagerty: I asked him in the earlier examination.

Q. Mr. Olender, were all these suits sold that you purchased under the Goodman contract?

A. They were not.

Q. Did you take some of them into your store?

A. I did.

Q. All right. Directing your attention to the chart, the left-hand column, the third figure down of \$8,550. Will you describe that transaction, what it represents, to the Court and to the ladies and gentlemen of the jury?

A. Well, that represented 342 suits——

Mr. Drewes: Object to that, your Honor, and ask that it be stricken, because the records will speak for themselves.

Mr. Hagerty: I think, your Honor, that he can explain [393] the transaction.

The Court: Yes, he may.

Mr. Drewes: If your Honor please, I consider this of considerable importance. The inventory records are made for identification and they are not in evidence. That being so, this witness cannot properly testify as to how many suits were on hand at a given time.

The Court: You refer to the inventory for the purposes of refreshing his recollection. He can't carry those figures in mind.

(Testimony of Milton H. Olender.)

Mr. Drewes: I suggest that he do so, then.

The Court: All right.

Q. (By Mr. Hagerty): Mr. Olender, I show you defendant's Exhibit N, for identification, which is three bundles of inventory sheets. Can you point out on these inventory sheets the item that corresponds to the number 342 suits on this chart that were taken into your inventory? Page No. 45 of the inventory of 1945, isn't it?

A. No, that is 1/1/1945. We are looking for the end of 1945. There is an item on the inventory of 322 serge suits.

Mr. Drewes: May I see it, please? Just show me the item, please.

Mr. Hagerty: Showing you the item now in defendant's Exhibit N for identification, which is a group of inventory sheets for the year 1946, January 1st of 1946, an inventory [394] sheet marked "Miscellaneous items, basement No. 1," and on the middle of the page there is a quantity indicated of "322 serge sailor suits."

Mr. Drewes: Will your Honor examine the item to which the witness has referred (handing to Court). I submit, your Honor, there is nothing appearing therein to identify those suits as to source, amount or in any other particularity as an inventory record which shows as of the date in question he had those suits in stock and that apparently is the source of the testimony being elicited. I assume the witness had sailor suits on hand at the beginning of the year since he has

(Testimony of Milton H. Olender.)

been in business, as far as the records are concerned.

Mr. Hagerty: That is true, but the amounts will show the difference in the number of items.

Mr. Drewes: The record speaks for itself. If counsel will just point out to your Honor how that record supports the testimony which is sought to be put in the record——

The Court: Counsel, this is the basis or bases for the explanation on the theory of the defendant. They select an item in the inventory of "322 serge sailor suits" as a predicate for the amount shown here on the right-hand side of this breakdown of the sheet. They state that 20 suits were sold through the store register and 322 suits included in the inventory. If that is their position——

Mr. Drewes: Those are being identified as specific suits [395] that were purchased from the specific source and sold to a specific man.

Mr. Hagerty: Sure, it is a specific——

Mr. Drewes: ——traced from the vault into the bank account, and it is based on that particular record which your Honor has before you, and it supports nothing except that he had 322 suits.

Mr. Hagerty: It is a specific——

The Court: That may well be, but, counsel, you have the opportunity of examining on cross-examination as to this item of 322. You have the right to go into all phases of this analysis. They adopt the item of 322 suits.

Mr. Drewes: I objected to it on the grounds

(Testimony of Milton H. Olender.)

that the record was the best evidence. It is not in evidence and it does not support the testimony, and I objected.

Mr. Hagerty: We have offered it in evidence and you objected to it.

Mr. Drewes: On the grounds that it doesn't—

The Court: The objection is overruled. All of the factors, counsel, concerning the introduction of these items into the inventory may be gone into by you on cross-examination.

Mr. Drewes: I appreciate that.

The Court: In all phases of a matter.

Mr. Drewes: I appreciate that, your Honor. But it is my [396] position that the defendant is lifting himself by his own bootstraps. We have documents which have not been admitted in evidence and he is testifying from them. Now, I admit—

Mr. Hagerty: I will again offer—

Mr. Drewes: I object on the ground that the record speaks for itself. I object to the testimony. Now, if he offers the record in evidence—

The Court: The purpose of exhibiting the inventory to the witness was to refresh his recollection.

Is your recollection now refreshed as to the amount in question? A. It is, sir.

The Court: That was my purpose. I was not inclined to rule on the admissibility of the inventory. This witness testifies under oath that out of the original lot 322 suits were found—they were

(Testimony of Milton H. Olender.)

in the inventory. Now that is his testimony under oath. It is not for the Court to rule on the admissibility of the inventory. He testifies that 322 suits found were in the inventory. Now, there it is.

Mr. Hagerty: Now if Mr. Drewes has changed his position——

The Court: Let's not argue.

Mr. Hagerty: ——and will not object to this going in——

Mr. Drewes: I have not changed my position.

Mr. Hagerty: I will offer it into evidence. [397]

Mr. Drewes: I will object, Mr. Hagerty.

Q. (By Mr. Hagerty): Having refreshed your recollection there and found the items we have been discussing, can you tell us what happened to the 342 suits as indicated on the Schedule 1, analysis of the Goodman transaction, Mr. Olender?

A. Well, there were 342 suits left after selling 200 suits to Mr. Lerman, and 280 suits, which Mr. Leavy had disposed of, and of those 342 suits some twenty of them had been sold in my store, put into my cash register and recorded as sales of the business, and at the end of the year the 322 suits were included in my inventory.

Mr. Drewes: Your Honor, that is going a bit too fast for me. I wonder if we might have it a little bit slower. 342, 322 remaining, I didn't quite understand. Would you recapitulate?

A. We sold 200 suits——

(Testimony of Milton H. Olender.)

Mr. Drewes: How many did you have? Let's start from there.

A. 822 suits.

Mr. Drewes: When was that, Mr. Olender? I assume I may ask.

Mr. Hagerty: We have no objection.

A. When the Goodman suits came in there were 822 suits delivered.

Mr. Drewes: I just want the date, Mr. Hagerty. Would you [398] ask him that, the approximate date, when was that?

Q. (By Mr. Hagerty): In the Goodman transaction, Mr. Olender, about when did you get delivery of these suits, if you recall?

A. I believe most of them came in during February and March. They didn't all come in at once. They came in piecemeal.

Q. That is in the year 1944? A. '44.

Mr. Hagerty: Is that it?

Mr. Drewes: Yes.

Q. (By Mr. Hagerty): Now, Mr. Olender, directing your attention to about the fourth figure down in the left-hand column, Schedule 1, the \$7,000 figure. Can you explain that to the ladies and gentlemen of the jury?

A. Well, that \$7,000 was the proceeds of the sale of suits that Mr. Leavy had made for me at \$25 a suit, my cost, and which he turned over to Mr. Saraga.

Q. Now, directing your attention, Mr. Olender,

(Testimony of Milton H. Olender.)

to Schedule 2 of the analysis, the smaller sheet, the analysis of the Saraga transaction——

A. I haven't that, sir.

Mr. Drewes: If your Honor please, I have no intent to upset this examination, but a moment ago I requested that the witness go through each one and point out——. I had lost [399] track of it and we went back and we had 822 suits to begin with. Now if Mr. Hagerty has no objection, I wonder if we could go through that again.

Mr. Hagerty: Do anything you wish, to accommodate you.

Mr. Drewes: Would you, please? First, before going on, there were 200 then sold to Lerman.

Mr. Hagerty: You would like the suits outlined—that is, from the suit standpoint and not from the financial transaction?

Mr. Drewes: Yes.

Mr. Hagerty: Is that it?

Mr. Drewes: Yes.

Mr. Hagerty: All right.

Q. Mr. Olender, Mr. Leavy first disposed of 200 of those suits for you to Mr. Lerman, is that true? A. That's correct.

Q. Then he next disposed of about how many, how many do you find?

A. 280. That makes 480.

Q. 480?

A. And 480 from 822 would leave 342 suits. Simple subtraction.

Q. And the 342 suits were ultimately at the

(Testimony of Milton H. Olender.)

end of the year taken into your own inventory?

A. That's right. [400]

Q. As you testified.

A. Minus the 20 suits that had been sold.

Q. As evidenced by your inventory sheets, is that true? A. Yes.

The Court: Do you have the invoice of the sale of the 20 suits any place?

A. I have no invoices. You couldn't have an invoice. Those were sales to individuals.

Mr. Hagerty: Those were sales at retail in your store?

A. At retail, yes. They were sold at retail.

The Court: Those sales will show in your books?

A. They will show in my daily sales.

The Court: They will be reflected in books of account here? A. Yes.

The Court: All right. How do you account for the differential between \$7,889, as embraced on the inventory, and the figure \$8,550 as included in your breakdown here on this transaction? The projected figure in the inventory is \$7,889, and this figure is \$8,950.

A. Twenty suits would be how much? \$450.

Mr. Hagerty: I believe there is an error in the figure. The price as indicated in the inventory sheet of \$24.50 instead of \$25. [401]

Q. Would that account for that difference, Mr. Olender? A. It might, I don't know.

The Court: You take the suits into the inven-

(Testimony of Milton H. Olender.)

tory, according to your testimony, Mr. Olender, 322 suits at an inventory cost of \$24.50.

A. Yes, sir.

The Court: You multiply 322 times \$24.50, and you get \$7,889, is that correct? A. Yes.

The Court: You figured that out before?

A. I presume I did. I made all those——

The Court: How do you account for the difference between the \$8,550 and the \$7,899?

A. I did not get up this chart, your Honor. The accountant got it up and he has worked that out. I didn't.

Mr. Hagerty: The 342 suits, your Honor, would be at the rate of \$25, which was the cost instead of \$24.50.

The Court: The difference is 50 cents. If you multiply fifty cents times 20 suits, how much would it give you? A. Ten dollars.

Mr. Hagerty: Ten dollars.

The Court: That would not account for the difference between \$8,550 and \$7,889, would it? I wish you would have your accountant break that down for me, and also examine the [402] books of account and find out the proceeds of the 20 suits, where they show in the books of account.

We will take the morning recess now, ladies and gentlemen, with the same admonition to you, not to discuss the case under any conditions nor to form an opinion until the matter is submitted to you.

(Recess.) [403]

(Testimony of Milton H. Olender.)

Mr. Hagerty: I believe just before we recessed, your Honor brought up something about the difference in the inventory item of \$7,889 as against the other item of \$8,550 shown on the chart. That error is accounted for by a mistake in pricing on the inventory sheets that reduced the price of 50c and there is also 20 suits out of the item. If we price 322 suits at \$25, we find that that amounts to \$8,050, and then 20 suits at \$25 make \$500. That would make \$8,550. There is an error in the price.

There was a pencil notation on the inventory sheets showing that those suits had been \$24.50 instead of \$25, that accounts for the difference. But following this witness we will have the accountant who has analyzed the books and prepared these charts and he will be able to explain that for you.

Mr. Drewes: What statement did you make with respect to the 20 suits?

Mr. Hagerty: Twenty suits that were sold were priced into the inventory at \$25. That would be \$500.

Mr. Drewes: You mean they were not sold?

Mr. Hagerty: They were sold, so there were only 322 left in inventory. As you saw in the inventory sheets, 322 left out of 342 that first went into the inventory sheets.

Mr. Drewes: I believe before the recess, your Honor, you requested that he had better point out in his books the [404] accounting for the 20 suits sold here.

(Testimony of Milton H. Olender.)

The Court: I assume they will at the proper time.

Mr. Hagerty: Ultimately they will show in the general sales from the store.

The Court: And that they are reflected in the books of account which are before the Court.

Mr. Hagerty: Yes, I have the accountant's word for that, your Honor. I am not an accountant myself.

The Court: That takes us to the next item, does it?

Mr. Hagerty: Yes, your Honor. The next item would be the item of \$7000 cash in the left hand column, as I understand it.

Q. (By Mr. Hagerty): Mr. Olender, directing your attention to the item of \$7,000 in the left hand column of Schedule 1 what does that figure represent?

A. Which one? There are three \$7,000 items.

Q. That is right. Start with the first one and go on to the next, and explain it to us.

A. Well, the first \$7,000 represents the suits which Mr. Leavy sold, and the second \$7,000 represents the proceeds of that sale which he turned over to Mr. Saraga. The third \$7,000 represents part of the refund check which I received from Mr. Saraga of \$7,725.

Q. And why was money refunded to you?

A. Partly because he could not send me any more suits. He [405] couldn't deliver those suits, and partly because of the failure to deliver in the

(Testimony of Milton H. Olender.)

other purchase which I had made to him of some of the suits and I had a refund on that.

Q. Now, that item of \$7,725 with the notation to the left of the total of the Saraga check dated November 15th, 1945, does that have reference to Government's Exhibit No. 41, the check on M. Saraga?

A. I presume that it does; same date.

Q. Would you look at the endorsement on the back of that check?

A. It is endorsed by the Army-Navy Store by M. Olender.

Q. When you received that check do you recall whether or not it was post-dated?

A. I am sure that it was post-dated.

Q. Subsequently did you have the difficulty in making collection for that item?

A. I am not sure if it was that item or a later item.

Q. If you will look at the endorsements on the back maybe your mind would be refreshed. Will you read those endorsements on the back of the check?

A. Well, the first endorsement is dated November 9th, the Bank of America, Oakland, main office, which is evidence that I deposited the check before the November 15th date which is on there. The second endorsement—well, there is three on here. I can't read the date on this second one. [406] There is the stamp of the Oakland Bank of America, and the third endorsement is to any banker or

(Testimony of Milton H. Olender.)

trust company or through the New York clearing house.

Q. What is the date of that?

A. November 14, 1945, the day before this check was dated.

Q. Is there a third endorsement on there, Bank of America collection department?

A. Yes, there is.

Q. Does that refresh your memory in any respect as to the check?

A. Well, I must have put that check through for collection.

Q. Would this be the check, then, that was returned unpaid and then you took to the bank for collection?

A. It probably is.

Q. Can you point out to us in your books which are in evidence, Mr. Olender, the records you have of the Saraga transactions as represented by these items of \$7,725 and also the last four or five items in the right-hand column of Schedule No. 1?

A. If you bring me the book I guess I can. Which item do you want?

Q. Well, explain the whole transaction. Can you explain the entire Saraga transactions from Schedule No. 1 or from the analysis in Schedule No. 2?

A. Well, I believe No. 2 would be simpler. I mailed Mr. [407] Saraga a series of checks totalling \$18,000 on the Army-Navy Store account and subsequently mailed Mr. Saraga a check for \$6,500 on the Army-Navy Store account totalling \$24,500.

(Testimony of Milton H. Olender.)

I think you will note that is item 4. I received an invoice from Mr. Saraga dated 7-31-45 for one thousand suits at \$25.

Q. Well, just a moment now. On the right-hand column of Schedule No. 1, that is the long sheet, are those checks and the dates of those checks outlined there and those payments beginning at \$18,000 July 31st? A. They are in my books.

Q. Can you find them from your books there? Can you point them out in your books?

A. Just a minute.

Q. I think they are marked.

A. On page 53 of the cash paid out journal dated——

Q. Which is defendant's Exhibit No. K in evidence.

A. (Continuing): ——dated 7-23 there are checks No. 2500, 2501, 2502, 2503, and 2504 each one for \$3,600 totalling \$18,000.

Q. And that corresponds to a similar item of \$18,000 shown on Schedule No. 1 in the right-hand column, the fourth figure down from the top, is that true? A. That is correct.

Q. Then can you find the next figure in your books there, [408] the \$6,500 item dated August 2, 1945?

A. Yes, it is on the same page, page 53, dated 8-2, M. Saraga, \$6,500.

Mr. Hagerty: May I show this to the Jury, your Honor? I will just hold it up.

The Witness: These are the \$3,600 checks to

(Testimony of Milton H. Olender.)

Mr. Saraga. There is one, two, three, four, five of them totalling \$18,000 and here is the M. Saraga check No. 2519 for \$6,500.

Q. (By Mr. Hagerty): Now, can you show from your books the merchandise that was charged into your purchases in connection with this transaction which would correspond to the figure, the next to the bottom figure in the right-hand column of Schedule 1? I believe you would find that in the purchase register at page 40 or 41 which is item 3 on Schedule 2. It is the smaller sheet?

A. Yes, on 7-31 there is an invoice from M. Saraga entered in as a purchase of \$23,775.

Q. Will you hold the book up and point it out to the ladies and gentlemen of the jury?

(Witness complies.)

Q. Now the final item, the \$725 item at the bottom of the right-hand column on Schedule 1, and also item 6, it is the same thing on Schedule 2, \$725, can you explain that to the ladies and gentlemen of the jury and can you [409] point it out in your books? I believe it is the general journal, page 21.

A. (Witness complies.) There is a notation on page 21 accounts payable were credited, I presume, 7-25, and it is noted refund from Saraga account, suits not delivered, miscellaneous account.

Q. Now, the last item on Schedule 2 which is \$7,000, can you explain that item to the ladies and gentlemen of the jury?

(Testimony of Milton H. Olender.)

A. Well, that is the \$7,000 which Mr. Leavy originally took to New York with him and which I deposited in my personal account.

Q. Then I would ask you this question, Mr. Olender. In these transactions with Mr. Goodman and with Mr. Saraga was it ever your intention to conceal any of these items?

Mr. Drewes: Objected to, your Honor, opinion and conclusion of the witness.

Mr. Hagerty: I will rephrase it then.

Q. Did you attempt to show all these transactions in your books, Mr. Olender?

A. I did ultimately, yes.

Q. Did you ever compare your books with other stores with whom you had done business with reference to purchases?

Mr. Drewes: Objected to as immaterial and irrelevant, your Honor. [410]

The Court: Sustained.

Q. (By Mr. Hagerty): Did you know a Mrs. Foote? A. Yes, I did.

Q. Who was she?

A. She was my wife's mother.

Q. In the year 1945 did you ever receive any funds from Mrs. Foote?

A. I received \$2,500 from Mrs. Foote.

Q. And would you explain that transaction to His Honor and the ladies and gentlemen of the Jury?

A. Well, Mrs. Foote had been saving up considerable money for several years, and she was in

(Testimony of Milton H. Olender.)

her eighties, she had lived with me since practically the day I was married until 1939 and she gave me that money for a specific purpose.

Q. What did you do with the money?

A. I gave that money to my wife to deposit in her bank account.

Q. Now, yesterday you testified in reference to the affidavit of Judge Monroe Friedman. At the time that the money was counted out in your box in his presence in the Bank of America in Oakland, how much money was there in that box at that time?

A. \$75,000.

Q. Did you count the whole amount and all the contents?

A. We counted everything there, yes, sir. [411]

Q. When you learned that the United States was questioning your income tax declarations, what did you do?

A. I went to my banker and personal adviser, Mr. Reinhard.

Q. About when was that?

A. Early in 1948.

Q. What did you do then?

A. Well, I told Mr. Reinhard that I was having some difficulties, that they were questioning some of my T.C.R. returns and some bond purchases which I had made over the counter with him and a business transaction which I could explain, but that I wanted to get an accountant and a tax attorney. I did not want two men. I did not want an attorney and an accountant separately, but I

(Testimony of Milton H. Olender.)

wanted a combination of the two in one man, and he said that he knew of such a man. He said the firm of D. A. Sargent & Company had a tax attorney and accountant as a partner of Mr. Sargent in the firm.

Q. Then what did you do?

A. I went to see Mr. D. A. Sargent—

Mr. Drewes: Object to any further questioning along that form, your Honor. May questions be asked in the usual manner so that I can have an opportunity to object?

Mr. Hagerty: I said "What did you do?" and the answer, naturally would be he went to this firm.

Mr. Drewes: The witness answered, Mr. Hagerty— [412]

Q. (By Mr. Hagerty): What did you do after you received advice in reference to this certain firm?

A. I went to see Mr. Sargent and as I entered the door of the firm of D. A. Sargent & Company I read on that door, "D. A. Sargent" and underneath that, "Charles R. Ringo, CPA, attorney-at-law."

Q. Who did you talk to at that firm?

A. I talked to Mr. Sargent at that time and told him just what I wanted, and the type of person that I wanted, and I never spoke to Mr. Sargent again from the very inception of this case until this day about any of the facts, figures or anything concerning this.

(Testimony of Milton H. Olender.)

Q. You used the phrase that you haven't spoken to Mr.—

A. I mean that we have nothing—he had nothing whatsoever to do with any of the accounting features personally with me. I never spoke to him.

Q. Then what next happened?

Mr. Drewes: If your Honor please, these questions all call for recitals, they are self-serving declarations without end. I wish you would instruct counsel to ask questions in the usual form so the Government can have an opportunity to object.

Mr. Hagerty: I don't know how I could ask a question that would be less leading. I could ask him did Mr. Ringo come to see you? [413]

The Court: All right.

Q. (By Mr. Hagerty): Did Mr. Ringo come to see you?

A. Mr. Ringo came to my store and we sat in the back of the store, and I explained to him just exactly what I wanted. I told him, I said, "Mr. Ringo, I understand you are an attorney as well as an accountant, and as such I have certain information that I should like to give to you," and I, at no time, had a contract with the firm of Sargent & Ringo. The fact that Mr. Reinhard had sent me there was sufficient for them to know that I was all right.

Mr. Drewes: May that all be stricken as not responsive and self-serving?

The Court: The motion may be granted.

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Did you retain Mr. Ringo at that time? A. I did.

Q. Did you then carry on with him all your tax matters? A. I did.

Q. Was there any particular reason why you wanted an attorney and an accountant combined in one man?

Mr. Drewes: I will object to this, your Honor. It calls for a self-serving answer.

The Court: Overruled.

A. Yes, there was. In my net worth statement, as is noted, there are many items concerning my mother, and my [414] mother was seventy years old and not in good health, and I didn't want many of those items disclosed. I didn't think that they were part of anybody else's business but my mother's and mine.

Q. Yesterday you spoke about \$75,000 that you brought from the vault in Fresno up to Oakland and deposited in your own safety deposit box. Have you ever counted that money in your father's lifetime? A. Many times.

Q. Did any of that money come to you from your father's estate? A. None of it.

Q. Mr. Olender, I show you Government's Exhibit No. 20 for identification, a partnership return for the year of 1946. Can you identify that document? A. I can.

Q. Who are the names on that partnership return? What are the names on it?

A. Olender, Hamilton, Caplan, Gambord.

(Testimony of Milton H. Olender.)

Q. Who are those people? Can you identify them?

A. Olender represents Mrs. J. Olender, my mother, and me. Hamilton is Martha Hamilton, my cousin. Caplan is Esther Caplan, my cousin. Gambord is Terris Olender Gambord, my sister.

Q. Is that the return on which you showed an item in [415] connection with the sale of the Riverdale Ranch?

Mr. Drewes: If your Honor please, that has been marked for identification only. It is a Government exhibit. I suggest that it be put into evidence if the witness is going to be questioned with any particularity.

The Court: That is correct, counsel.

Mr. Hagerty: We don't have ours. We will bring ours this afternoon. We just don't happen to have it, but ours has an additional memorandum attached.

The Court: Well, reserve it until this afternoon.

Q. (By Mr. Hagerty): Did you receive any gift from your mother during the years 1944 or '45?

A. Yes, I did.

Q. Can you tell us about those gifts?

A. I don't remember the exact sums, but they are reported in my net worth statement, the amounts and the dates. There were two or three thousand dollars at a time two or three times a year.

Q. I show you Exhibit 7, Schedule A, on Government's Exhibit 24—

(Testimony of Milton H. Olender.)

Mr. Drewes: I call counsel's attention to the fact that that is for identification only, your Honor.

Mr. Hagerty: Oh, I am sorry, it is Exhibit 25 for identification. 24 is in evidence—Government's Exhibit 25 for identification, the last sheet thereon indicated as [416] being Schedule A. Does that, after reading that, does that refresh your memory as to gifts you received from your mother?

A. It does.

Q. Could you tell us what gifts you received and when you received them as outlined there?

A. You wish them from 1942 on?

Q. No, just during the period that is involved, 1944, '45, '46?

A. On January 6th, 1944, there was a \$2,000 gift. On July 5, 1944, \$2,500. On December 15, 1944, \$1,000. On January 2, 1945, \$3,000.

Mr. Hagerty: If your Honor please, in reference to that partnership return I was speaking of, our own copy unfortunately has been left at the office and I would like to examine the defendant in reference to that. I wonder if we could start the noon recess now.

The Court: Ladies and gentlemen, we will take the noon recess and resume at two o'clock this afternoon with the same admonition not to discuss the case under any conditions or to form an opinion until the matter is submitted to you.

(Thereupon Court was recessed until two o'clock p.m.) [417]

September 23, 1952, 2:00 P.M.

MILTON H. OLENDER

the defendant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

Direct Examination
(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, I show you a partnership return for the year 1946 which is marked as the United States No. 20 for identification (handing to witness.) Do you recognize that partnership return? A. I do.

Q. Did you prepare that partnership return?

A. I did.

Q. Is there any reference in that partnership return to a sale of the Riverdale Ranch?

A. There is, in the partnership breakdown, but there is missing a sheet which was filed with this return called "Schedule 1040," which reported in detail the sale of that ranch. It was stapled on here originally and is not with this return.

Q. I now show you a similar form of partnership return for the year 1946 and a schedule of gains and losses, which is Schedule D, Form 1040, Government forms, United States Government forms for income tax purposes, and ask you if you recognize those forms? [418]

A. I do. I prepared them also.

Q. Where did you get those forms?

A. These are from my files.

(Testimony of Milton H. Olender.)

Q. Are those your own copies of the returns that were made on that partnership for that year?

A. They are.

Q. What does that schedule "Capital Losses and Gains" refer to?

A. It refers to the sale of property, of the sale of the Riverdale property, which was sold in 1946.

Q. Was the original of that form submitted with your partnership return to the Federal Government?

A. It was.

Mr. Hagerty: At this time, your Honor, I would like to offer in evidence as the defendant's next in order this partnership return with its accompanying schedules.

Mr. Drewes: May I ask the witness one or two questions on voir dire?

The Court: Yes.

Mr. Drewes: And may I see the exhibits, please?

Q. I hand you the partnership return and the schedule to which you have referred, Mr. Olender, and ask you if the schedule is an original or a copy?

A. This is a copy of the original.

Q. The schedule? [419]

A. This, yes, sir.

Q. I call your attention to the fact that the Schedule D refers to Form 1040, whereas the partnership form of course is Form 1065, and ask you if you submitted the schedule in connection with your partnership return or with your individual return?

(Testimony of Milton H. Olender.)

A. I submitted that with the partnership return, and that was the form given to me by the Internal Revenue Office in Oakland to file with this partnership return.

Mr. Drewes: No further questions.

Q. (By Mr. Hagerty): I show you, Mr. Olender, a State of California partnership return of income, Form 565. This is the yellow duplicate copy, and ask you if you recognize it?

A. Yes, sir.

Q. What is that partnership return that you are looking over now?

A. It is a return for the same partnership which was filed with the State of California for the year 1946.

Q. Does that return indicate a loss?

Mr. Drewes: Objection, Mr. Hagerty, and ask that—call counsel's attention to the fact that the return has not been put in evidence. In connection, your Honor, with the exhibit which you are now examining, I would just like to reserve objection on the ground that it appears to be an original and not a duplicate—specifically with respect to [420] the schedule, I refer to that.

Mr. Hagerty: Well, if your Honor please, I believe that goes to the weight of the testimony more than anything else.

Mr. Drewes: We may find it necessary to have it examined by an analyst of questioned documents.

The Court: This is the duplicate, is it?

Mr. Hagerty: That, the form itself.

(Testimony of Milton H. Olender.)

A. May I explain that?

The Court: Yes, you may.

A. Your Honor, I typed all of these forms myself. As you know there are six names on that partnership and I only made one or two or three carbons and then I made another original and I kept the original so that I would have a good copy. But the original of the first that I typed went to the Internal Revenue Department.

The Court: But these are true and correct copies?

A. True and correct, just as they were filed.

The Court: I will accept that statement.

Mr. Hagerty: We ask they be introduced in evidence then, your Honor.

The Court: Yes, they may be marked.

The Clerk: Defendant's Exhibit P in evidence.

(Thereupon Federal Return was received in evidence and marked Defendant's Exhibit P.)

Mr. Hagerty: Then I would offer into evidence, your [421] Honor, the partnership return that the defendant has just testified to made up for the State of California.

Mr. Drewes: To that I object, incompetent, irrelevant and immaterial, your Honor.

The Court: The purpose of the return?

Mr. Hagerty: The purpose of that, your Honor, is to rebut the inference and statements by Government witnesses on the stand that the defendant failed to report the loss on the sale of the Riverdale Ranch, which Schedule in connection with

(Testimony of Milton H. Olender.)

that form is identical in general terms with that reported on the Federal form.

Mr. Drewes: Obviously it has no such probative force.

Mr. Hagerty: It would tend to show a course of conduct on the part of the defendant. He reported the incident in his Federal form and he also reported it in his State form. The general presumption would be that he——

The Court: I will allow it.

Mr. Hagerty: ——would have no reason to hide the transaction.

The Court: I will allow it. It may be marked.

The Clerk: Defendant's Exhibit Q in evidence.

(Thereupon California State Form was received in evidence and marked Defendant's Exhibit Q.)

Mr. Hagerty: You may cross-examine. [422]

Cross-Examination

By Mr. Drewes:

Q. Mr. Olender, you testified that you graduated from the University of California in the year 1918?

A. Yes, sir.

Q. And while in attendance at the University of California did you take any courses in accounting?

A. About three courses in my four years.

Q. Did you, Mr. Olender, prepare the tax re-

(Testimony of Milton H. Olender.)

turns for yourself and for your wife for the years 1945 and 1946 which have been admitted into evidence? A. I believe I did, sir.

Q. They are the Exhibits 1, 2, 3 and 4 in evidence. And you believe that you did?

A. I believe that I did, for '46 and '45.

Q. Did you prepare income tax returns for yourself and your wife in prior years?

A. Yes.

Q. Have you prepared income tax returns for other persons, Mr. Olender? A. Yes, I have.

Q. Will you state for whom you prepared tax returns?

A. All—not all. My mother, my sister, my son and daughter, employees in my store who had just wages and such, and for a few friends. [423]

Q. Did you ever receive compensation for preparing income tax returns for others?

A. Yes.

Q. And will you state when, for whom you prepared the returns and how much received?

A. Sometime in the early forties I prepared—I did not prepare—I assisted in the preparation of the returns of the Simmons Glove factory relatives of mine.

Q. And you were paid for that work?

A. They tendered me a check which I did not keep.

Q. You returned the checks to them?

A. No, I did not return the checks to them directly. I cashed those checks and gave my aunt,

(Testimony of Milton H. Glender.)

who is a very ardent social worker, the money to give to a couple of her charities. The sum was only \$25.00.

Q. For what years did you prepare those returns, do you recall?

A. Oh, it was '40, 1, 2 or 3, somewhere along in there. After that I just couldn't handle it. I had too much of my own affairs to take care of.

Q. How many returns did you prepare?

A. For whom?

Q. For the Simmons Glove factory.

A. Oh, several. Several prior to that, for which I wasn't paid. [424]

Q. Do you recall specifically how much you were paid for that?

A. \$25.00 was the most. I think there were two.

Q. On how many different occasions?

A. Two occasions.

Q. On two occasions? A. Yes.

Q. Did you report a receipt of that money?

A. I did not report the receipt and I did not report the disbursement.

Q. And you have testified, Mr. Glender, to a business concern owned by your uncle and your father which was operated by them in Fresno for a couple of years? A. Yes, sir.

Q. Did you do auditing work for that firm?

A. No.

Q. You worked for that firm, as you have testified, following your graduation?

(Testimony of Milton H. Olender.)

A. For a very short period.

Q. Did you not ever do auditing work?

A. No, sir, not to my knowledge.

Q. Did you do auditing work for a firm in which your mother had an interest?

A. A firm that my mother had an interest in?

Q. Or a business undertaking? [425]

A. Not auditing, no, sir. I never did any auditing in my life for anyone.

Q. Mr. Olender, you recall filing an affidavit with the Bureau of Internal Revenue in connection with your father's estate in which you stated you had graduated from the University of California in 1918 as a trained accountant and that beginning in that time and thereafter for a number of years you performed the audits of the businesses in which your father and uncle and mother had an interest?

A. I will answer that question, if you permit me to explain.

Q. Answer the question.

A. I signed such an affidavit.

Q. And did the affidavit contain the statements which I have just referred to?

A. It may have.

Q. I am going to show you a document in the form of an affidavit and call your attention particularly to page 3 and to the language which begins on line 4 and continues thereafter to line 10 and ask you if that refreshes your recollection?

A. Yes, sir.

Q. Did you file such an affidavit?

(Testimony of Milton H. Olender.)

A. Yes, sir.

Q. Did you state in that affidavit that you were a trained [426] accountant and that for a number of years you had audited the books of the family businesses in which your mother and father and uncle had an interest?

A. That is what it says in there.

Q. This is your affidavit? A. Yes, sir.

Q. This affidavit was sworn to by you, Mr. Olender? A. Yes, sir.

Mr. Drewes: At this time, your Honor, the Government offers the affidavit, copy of an affidavit which has been identified by the witness, as Government's Exhibit next in order.

The Court: Counsel, will you examine it?

Mr. Hagerty: We have examined it, yes. We have no objection.

The Court: This is a copy of an affidavit signed by Milton Howard Olender.

You signed the original of this, Mr. Olender?

A. Yes, I did.

The Court: And it was subscribed to and sworn to before a notary public?

A. Yes, I believe it was.

The Court: Do you wish to make this a conformed copy of an affidavit? This isn't conformed to the original.

Mr. Drewes: That is a copy. The original is in the files [427] of the Bureau.

The Court: It isn't a copy to the extent that it is a conformed copy. There is no signature and

(Testimony of Milton H. Olender.)

neither does the notary appear. If you wish to conform it you may do so for the purpose of the record. As it stands now, it is not a conformed copy.

Mr. Drewes: Well, then, your Honor, may it be lodged with the Clerk and that will be done?

The Court: All right.

Q. (By Mr. Drewes): Mr. Olender, in what year did your late father die? A. 1940.

Q. And where was his estate probated?

A. I am not sure but I believe in the City and County of Los Angeles.

Q. Did you act as the accountant for your late father's estate, Mr. Olender?

A. I did some of the work.

Q. And did you receive a fee from the personal representatives of your father for that work?

A. I did.

Q. State, if you will, what work you did as an accountant in connection with your father's estate, Mr. Olender?

A. The bills call it accounting work. It actually wasn't accounting work. I went to the appraiser, Mr. Walker, in [428] Fresno. I think he was the Estate or the Federal, and I also went to the—whichever one it was, I went to both appraisers—and I had to leave my business in Oakland and I had many conferences with them in trying to determine the value of the various properties which my father had left, and it was mainly in line of that kind of work that I was paid. It wasn't accounting work. I did very little accounting work,

(Testimony of Milton H. Olender.)

although the fees may have been called accounting work.

Q. Did you consult with employees of the Bureau of Internal Revenue in connection with that estate?
A. I don't remember that.

Q. Did you prepare the returns in that estate?

A. What returns?

Q. The estate tax returns?

A. No, sir, I did not.

Q. Who did?

A. I don't know. I believe—this is only a guess—Sidney Reed and Company of Los Angeles.

Q. State if you know who furnished the information upon which that estate tax return was prepared?
A. The executors or executrixes.

Q. Who were they?

A. My mother and my sister.

Q. And did you furnish any information? [429]

A. No, not to my knowledge.

Q. Did you examine the return before it was filed?
A. No, sir.

Q. Did the executrixes ask you many questions in connection with the details of it?

A. Not that I remember.

Q. You have testified that you had many conferences with the inheritance tax appraisers?

A. Yes.

Q. The subject of those conferences was the value to be put on the estate for inheritance tax?

A. No, I only——

Q. What was the——

(Testimony of Milton H. Olender.)

Mr. Hagerty: I will object to this entire line of questioning. It runs into collateral impeachment and I think we are going far afield.

The Court: Overruled.

A. What was your question?

Mr. Drewes: Read it, Mr. Reporter, please.

(Question was read.)

Q. (By Mr. Drewes): What was the subject of the conferences which you had with the inheritance tax appraisers?

A. They were the Olender Building in Los Angeles, the Olender building in Fresno, the Riverdale ranch, the McKinley ranch, the E Street house, and I guess that is all [430] the properties, and it was trying to get an evaluation on the properties. In other words, the higher the evaluation, the higher the tax that you paid on inheritance, and the lower you got it—and we tried our best to get as low an evaluation as possible, and that was the work that I did.

Q. The conferences were held, I take it, with the California state officials?

A. It may have been, I don't remember whether I held it with the State or Federal. I know Mr. Ben Walker was the man that I held several conferences with and he was either federal or State, I don't remember.

Q. Mr. Olender, I noted in your description of the subject matter of discussions you referred only

(Testimony of Milton H. Olender.)

to real property. Didn't you have any discussions with respect to personal property?

A. I did not.

Q. Did the inheritance tax attorneys ask you any questions about the personal property?

A. No, sir, they did not, not to my recollection.

Q. Any questions concerning the amount of and number of stocks and bonds that stood in his name?

A. All of that was taken down at the time of my father's death, all of his stocks and bonds and so forth were in his safe deposit box, and a gentleman from the State or federal, [431] I don't know which, wrote those down in great detail and they had all of that.

Q. No one asked you at any time, Mr. Olender, as to the amount of cash in banks or elsewhere that your father held at the time of his death?

A. All the cash in the banks was in his estate report.

Mr. Drewes: May that be stricken, your Honor, as not responsive?

The Court: That may go out. The question was, did anyone ask you?

Q. (By Mr. Drewes): Did anyone ask you?

A. No, sir.

Q. As to the amount of cash that your father had in banks or otherwise? A. No, sir.

Q. At the time of his death? A. No, sir.

Q. You testified, Mr. Olender, as to a large sum of money, \$75,000, that was in a vault in Fresno at the time of your father's death. State if you know if that was included on his estate tax return?

(Testimony of Milton H. Olender.)

A. It was not.

Q. How do you know that?

A. I have looked at it since. It is not on there.

Q. You have looked at the estate tax [432] return?
A. Yes, since then.

Q. That was after it was filed?

A. Yes, many years after.

Q. You never saw the tax return before it was filed?

A. No, sir, not that I remember. I may have seen it to sign it, but I don't remember the details of it.

Q. Did anyone ever question you in connection with the preparation of your father's—strike that. Did anyone ever question you in connection with the probate of your father's estate or the preparation of federal tax return as to whether you had received any gifts from your father prior to his death?
A. Not to my knowledge.

Q. I take it your testimony is that the estate was probated and the tax returns were filed with no reference to you whatsoever as the source of information?

A. As far as I remember it, that's 12 years ago, Mr. Drewes.

Q. Did you volunteer any information?

A. No, sir.

Q. To the personal representatives of your father as to any assets which your father had on hand or as to any gifts which he made to you?

A. That is a double question.

(Testimony of Milton H. Olender.)

Q. I just referred to two subjects. Did you volunteer the [433] information?

A. I volunteered information as to his assets, yes.

Q. As to cash on hand or gifts made to you? I will rephrase it. Did you volunteer any information to the personal representatives of your father concerning cash which your father had on hand at the time of his death or gifts made to you prior to his death?

A. Who do you mean by personal representatives of my father?

Q. The executors or the executrixes of the estate?

A. Well, one of the executors or executrixes was my mother. The other was my sister. I didn't volunteer anything to them, no.

Q. Did your sister know that your father had \$75,000 in the vault in Fresno?

A. She did not.

Q. Did your sister know that your father had made gifts to you in the amount of \$5,000 a year for a period of ten years before his death?

A. She did not.

Q. Did your mother know that your father had \$75,000 in a vault in Fresno at the time?

A. She did.

Q. And did she know that your father had made gifts of \$5,000 a year to you for a period of ten years before his [434] death?

A. She did.

Q. Did Mr. Reed, the accountant for the estate,

(Testimony of Milton H. Olender.)

have that information? A. I do not know.

Q. You testified that you received fees as an accountant for the estate of your father?

A. Yes.

Q. Do you remember when you received those fees?

A. Oh, they could have been in '41 or '42. I am not sure of the years. They are reflected in my income tax return.

Q. Do you remember the amount that you received?

A. I believe it was \$1,900. I am not sure.

Q. And you say that was, whatever the sum was, was— A. It was reported in my income.

Q. —reported on your return?

A. Yes, sir.

The Court: From whom and under what circumstances were those fees received? Will you answer that?

A. I believe they came from the estate.

The Court: It isn't clear in my mind. It may be in the jurors. But it isn't clear in my mind the circumstances under which you were paid the moneys and by whom or from whom you received the moneys and the attendant circumstances of the accounting details. What did you do, and what were the [435] services you rendered and for whom were the services rendered?

A. I stated the services rendered, your Honor, a short time ago.

The Court: I may have missed that.

(Testimony of Milton H. Olender.)

A. They were chiefly with the appraisers.

The Court: Who were the appraisers?

A. Mr. Ben Walker is the only one I remember. I am sure there was another one.

The Court: Where was his office?

A. In the Security Bank building in Fresno. I believe he is still there.

The Court: I see.

Q. (By Mr. Drewes): The fees that you have testified—

A. I will answer the Judge's question.

The Court: I just wanted a general picture in mind. I may have overlooked it. Who prepared the federal estate tax return?

A. You mean the return to the Government, not the income tax return?

The Court: No, in connection with the probate of an estate there is an inventory filed. Do you know?

A. Yes.

The Court: You helped compile the inventory, did you?

A. No, I did not. [436]

The Court: How did you help the appraisers?

A. By getting the figures down to where we wanted them down to. That was during their—this is still 1940 and this inflationary period hadn't started yet, and I was able to get the figure down so that we won't have to pay too large a tax on the building. I think we got very low values on all of

(Testimony of Milton H. Olender.)

the properties, which, of course, later when we sell them which we reflect in profits.

Q. (By Mr. Drewes): Mr. Olender, in the course of your conferences with the inheritance tax appraisers, to which you have testified, did you tell them at any time that your father had \$75,000 in the vault in Fresno?

A. I wasn't talking to them about what my father——

Mr. Drewes: May that be stricken as not responsive?

The Court: That may go out.

A. No, I did not.

Mr. Drewes: Just answer the question.

Q. Did you at any time tell them that you had received gifts in the amount of \$5,000 for a period of ten years prior to your father's death?

A. No, I did not.

Q. You have testified that you did not see the estate tax return of your father?

A. Not to my recollection.

Q. Before it was filed? [437]

A. Not to my recollection. I may have. I don't remember it, because I had nothing to do with the preparation of it.

Q. It was not submitted to you?

A. No, sir.

Q. By the accountant, whoever did prepare it before it was filed?

A. I was in Oakland. They were in Los Angeles.

(Testimony of Milton H. Olender.)

Q. You did not go over the return or discuss it with your sister or your mother before it was filed?

A. Not to my knowledge.

Q. To the best of your recollection when did you first see the estate tax return?

A. When this thing started.

Q. Would you be a little more definite? Give me an approximate date.

A. 1948, I believe.

Q. State, if you recall, whether that return includes the \$75,000 which you have testified your father had in the vault in Fresno?

A. I do not believe it did.

Q. Have you taken any steps since you first made that discovery, Mr. Olender, to see that an amended return was filed?

A. I have had no opportunity to do that.

Q. Since 1948? [438]

A. No, sir.

Q. State, if you recall, whether that return reflects any gifts as having been made by the decedent prior to his death?

A. I do not know. I don't remember.

Mr. Drewes: I have here, your Honor, an estate tax return of the decedent, Julius Olender.

The Court: Is that the State or Federal estate?

Mr. Drewes: Federal estate tax return.

(Discussion between counsel.)

Mr. Drewes: Yes, it is stipulated in may go into evidence.

Mr. Hagerty: Yes, we have no objection to it.

The Court: It may be marked in evidence.

(Testimony of Milton H. Olender.)

The Clerk: U. S. Exhibit No. 46 in evidence.

(Federal Estate Tax Return of Julius Olender received in evidence and marked U. S. Exhibit No. 46.)

Q. (By Mr. Drewes): Mr. Olender, I show you what has been admitted as the Government's Exhibit 46, the estate tax return of your late father and ask you to turn to the next to the last page where you will see two affidavits, and I will ask you if you can identify the signatures on those affidavits?

A. I can identify the signature of my mother only. I do not know the signature of the other [439] party.

Q. What is the name that appears?

A. Sidney R. Reed.

Q. You don't recognize that signature?

A. No, I do not.

Q. Do you know who he is?

A. Only that he is an accountant in the City of Los Angeles.

Mr. Drewes: Thank you. With the Court's permission—this is a rather long document, and I wish to call the attention of the Jury, for my purposes, just to two or three items therein. May I do that?

The Court: Certainly.

Mr. Drewes: Rather than hand the document to the jurors. It will take too much time.

Mr. Hagerty: We have no objection, your Honor.

Mr. Drewes: Thank you, Mr. Hagerty.

(Testimony of Milton H. Olender.)

This document has already been identified for you and there are one or two references that I wish to make to it as I just indicated to the Court.

Under Schedule D there appears a series of questions to be filled out by whomever is preparing and submitting this return, No. 3 of which is as follows:

“Did the decedent at any time make a transfer of an amount of \$5,000 or more without an adequate and full consideration in money or money’s [440] worth but not believed to be includable in the gross estate as indicated in the first paragraph (including six sub-paragraphs) of the instructions of this schedule?”

“Answer ‘yes’ or ‘no.’”

And the answer appears there as “No.”

Secondly, under Schedule J, provides for a listing of the funeral and administration expenses of the estate, and under item 2 appears the following:

“Milton H. Olender, 1026 Broadway, Oakland, California, accountant’s fees. Paid on December 2, 1940, \$1,500. Estimated additional fees to closing of estate, \$500.”

Now, immediately thereunder, as item 3, appears the following:

“Sidney R. Reed, 608 South Hill Street, Los Angeles, California, accountant’s fees, \$100.”

Thirdly, there appears under Schedule K, “Debts of Decedent,” a very long list, including 46 items. I have examined it and nowhere therein is any ref-

(Testimony of Milton H. Olender.)

erence made of any debt of the decedent to the defendant, Milton Olender.

Mr. Hagerty: If your Honor please, I will move to strike that as being a statement on the part of the attorney, the prosecutor. The document speaks for itself. [441]

Mr. Drewes: If that is not correct, counsel may call that to the attention of the jury.

The Court: If that is a correct statement, it may be received. If it is incorrect, it may be corrected by counsel. I assume that counsel is reading correctly.

Mr. Drewes: I couldn't find any such entry.

Mr. Hagerty: Well, I will take Mr. Drewes' reading of it.

The Court: Could I read it, please? (Examining document.)

This document appears to have been prepared by Sidney R. Reed, Fox Building, Los Angeles, California.

Was it prepared in its entirety by Mr. Reed?

A. I wouldn't know, sir. None of it was done by me.

The Court: May I ask you whether or not you were ever called into the offices of the attorneys who were preparing the papers incidental to the probate of the estate and who were actually probating the estate of your late father?

A. The attorney was my sister and she never

Q. Your sister was the attorney? A. Yes.

(Testimony of Milton H. Olender.)

The Court: She probated the estate?

A. I don't know. I don't know any of those legal——

The Court: Who were the attorneys of record in the [442] matter?

Mr. Hagerty: I don't know.

Mr. Drewes: I believe that is correct. The sister was an attorney admitted to practice. She is shown as being the attorney for the estate. Is that correct, to the best of your knowledge (directed to counsel)?

Mr. Hagerty: I don't know.

The Court: Mollie Olender, executrix—that was your mother? A. Yes, sir.

The Court: And your sister was the attorney. What was her first name?

A. Terrys Olender Gambord.

The Court: She is admitted to practice law?

A. She is a formerly deputy district attorney of Los Angeles.

The Court: And she probated this estate?

A. Yes.

The Court: Yes. I see her, Terrys Olender Gambord, attorney's fees for services.

Q. (By Mr. Drewes): Mr. Olender, state if you know where your sister, Mrs. Terrys Gambord, can be located?

A. I don't know. She has a post office box. I haven't seen my sister in many, many months.

Q. Mr. Olender, have you ever filed Federal gift tax returns [443] in connection with the gifts of

(Testimony of Milton H. Olender.)

\$5,000 from your father between the years received by you, between the years 1940 and '50, as you testified to? A. No, sir.

Q. State if you know whether your father or anyone on his behalf filed such returns?

A. I didn't and I don't know if anyone did on his behalf.

Q. Your answer is you don't know whether they were filed? A. I don't know.

Q. Now, Mr. Olender, you were in Court when Mr. Ringo testified that he did certain work for you in connection with the preparation of comparative net worth statements, and he testified, as I recall, that preparatory to doing so he wrote out a number of questions in his own handwriting and submitted them to you for your answers. Do you recall that testimony? A. Yes.

Mr. Hagerty: If your Honor please, it is just about the recess. In reference to this line of testimony I would like to renew some motions and argue the point.

The Court: All right.

The Jury may recess. The same admonition.

I will hear counsel in this matter.

(The following proceedings were had outside the presence of the Jury):

Mr. Hagerty: At this time, your Honor, it is apparent [444] that the Government is going to go into this question of communications again between the defendant and Mr. Ringo. In the light of the

(Testimony of Milton H. Olender.)

testimony of the defendant, which has added to prior evidence in the record, we think that we have established clearly the existence of a relationship of attorney and client.

The defendant wanted someone who could give him legal counsel in reference to his tax problems. He wanted that person also to be familiar and exercised in the field of accounting. He searched for such a man and was recommended to such a man through Mr. Reinhard, who so testified here on the stand.

He went to the Sargent Company. He talked to Mr. Sargent and asked to have Mr. Ringo sent to him.

In his preliminary discussions with Mr. Ringo he established that he was an attorney, that he could advise him in reference to the existing problems, and that he would also work out whatever accounting features he had to have to meet those problems.

Under all the circumstances we feel that the relationship of attorney and client was clearly established at that time and that any exchange of information between the two is in the nature of a privileged communication. And on that basis we again renew our motion to strike the testimony of the witness, Ringo, with reference to communications received [445] from him by the defendant or vice versa and we would object to any further inquiry along that line.

Mr. Drewes: The Government's position is, as it

(Testimony of Milton H. Olender.)

has been before, it makes little difference, is inconsequential as to what was in the defendant's mind, what he saw or what he wanted. The test is what was done, and the record is quite clear that the work done by Mr. Ringo was accountant's work.

I should also like to call your Honor's attention to a bit of testimony this morning. The defendant testified that one of the reasons he wanted an attorney was because he wanted to, as much as possible, I take it, keep out of this entire chain of events any reference to his mother's affairs, which struck me as being very interesting because the defendant himself has testified on direct examination as to many transactions with his mother. He testified as to gifts received and trips that she made up here and any number of things.

Mr. Hagerty: Might I answer that, your Honor? The defendant's approach to that problem was that his mother was an elderly woman and in not too good health, approximately 70 years old, that he wanted an attorney in the picture to begin with to protect her from needless investigation and harassment that she was bound to be exposed to if he had only an accountant.

Mr. Drewes: Certainly there is absolutely nothing in the [446] record, your Honor, at this stage other than the defendant's statement as to what he intended and what he expected to support the ruling for which counsel contends. Mr. Ringo's work was an excellent preparation of comparative net worth statements which had been asked of the de-

(Testimony of Milton H. Olender.)

fendant by the Government. I say Mr. Ringo's testimony supports that.

Mr. Hagerty: If your Honor please, it stems all from a man's legal tax liability, which is a question of law, and in that he was seeking advice and he was seeking it from a man who was an attorney skilled in the field of determining and ascertaining from businesses what tax liability is. I think that the two subjects in a situation like this are so inseparably intertwined that he cannot segregate one from the other. I think that we have a legal situation, and there is no question about it, and the relationship of attorney and client naturally would exist.

The Court: What is this document that you are about to take up? Is this——

Mr. Hagerty: This is the proposed net worth, the questions and answers upon which Mr. Ringo prepared——

Mr. Drewes: These were the answers as to the cash in vaults, your Honor, which were submitted to Mr. Ringo in the defendant's own handwriting.

Mr. Hagerty: There is also another objection that might be urged, that may be more recondite at this stage but more [447] familiar to your Honor in the early days on the bench, that those written statements tend to be admissions of the defendant upon which extra-judicial admissions upon which the Government seeks to establish the corpus delicti of the offense, which was something that I stated

(Testimony of Milton H. Olender.)

very slightly when we first raised this objection in the initial stages of this trial.

Mr. Drewes: If your Honor please, my associate counsel just suggested another matter which I haven't urged upon the Court, but I think is persuasive to my way of thinking at least. The net worth statements which are in evidence were submitted to the Government by Mr. Ringo on behalf of the taxpayer. This is part of the information upon which those net worth statements were built and there has been testimony to that effect. So even if the relationship which counsel seeks to establish did exist clearly there must be a waiver.

The Court: I will overrule the objections and the renewed motion to strike is additionally denied.

Are there any other matters to take up?

(Discussion relating to testimony of Mr. Lerman.)

(Thereupon a short recess was taken.) [448]

Q. Mr. Olender, Mr. Ringo did give to you a list of questions written out in his handwriting concerning your assets at various dates, did he not?

A. He gave me many of those.

Q. And you returned them to him with your answers?

A. Some of them, yes.

Q. I will show you the Government's Exhibit number 45, heretofore admitted in evidence, and call your attention particularly to number 19, analysis of use of cash in vault, and ask you if this is a copy of one of the lists of questions submitted

(Testimony of Milton H. Olender.)

to you by Mr. Ringo? A. I believe it is.

Q. And with respect to item number 19, analysis of use of cash in vault, with respect to that item the figures \$6,000, \$19,000, \$42,000, \$7,200, a line and the total figure \$75,000 appears. Is that in your handwriting?

A. Frankly, it does not look like it.

Q. Do you recognize the handwriting?

A. No, I don't.

Q. Let me see the Exhibit again, please. You will note this Exhibit has the figures which I read after the dates shown as follows:

Decrease in 1943, \$6,000. Decrease in 1944 (Goodman deal), \$19,000. Decrease in 1945, \$42,800. Decrease in 1946, \$7,200, and then the total, \$75,000. The total refers [449] to cash in vault brought by you from Fresno to Oakland following your father's death, is that not true? A. I do not know.

The Court: What was the last question?

(Question read by reporter.)

Q. (By Mr. Drewes): Do those figures have any meaning to you at all? A. They do not.

Q. Have you ever seen the original of that document that is in front of you?

A. It has been six years since——

Q. Answer my question.

A. I don't remember. I have evidently seen it. There is some of my handwriting on it so I must have seen it.

Q. State, if you know, where the original is?

(Testimony of Milton H. Olender.)

A. No, I don't.

Q. Do you have any—strike that.

Mr. Drewes: Will your Honor ask counsel for the defendant if they have in their possession the original of Government's Exhibit number 45?

The Court: You ask them.

Mr. Lewis: I have the original. Here it is.

Q. (By Mr. Drewes): Mr. Olender, your counsel has just handed me a document consisting of three sheets of yellow paper of legal size and a small pink piece of paper stapled [450] together, the first three pages are numbered and the name, Milton H. Olender, appears on the first line of the first page. I will ask you to examine this document and tell me if you recognize it?

A. Well, I don't recognize it, Mr. Drewes, but I must have seen it because there is some of my handwriting on it.

Q. That document consists, for the most part, of a series of questions, does it not, written out in pencil and numbered? A. Yes.

Q. And opposite most of those questions, do there not appear figures? A. Yes.

Q. And in whose handwriting are those figures?

A. They are not mine.

Q. None of them are yours?

A. Oh, yes, the ones on the left-hand side, not the ones on the right-hand side. These (indicating). All along this side, these figures here.

Q. You are referring to figures and letters which are in green ink? A. That is right.

(Testimony of Milton H. Olender.)

Q. Those you identify as yours?

A. I don't know if all of them are mine. I know some of them are. Everything here in green ink is mine— [451] this is not mine in green ink. Everything here in green ink is mine, and this in green ink is mine. This is not mine. This is not mine (indicating).

Q. And the numerals in pencil which appear at the right of each one of those questions, you state that those are not yours?

A. They are positively not my handwriting, no, sir.

Q. And you have no recollection of seeing that document before?

A. No, I haven't. I have no recollection at all. I gave him many, many documents.

Q. You don't—

A. I don't recall this one at all, no, sir.

Q. You don't recall giving to Mr. Ringo the information which has been put thereon in pencil in numerals?

A. No, I don't.

Q. And referring specifically to item number 19, the figures which total \$75,000, you have no recollection of giving that information to Mr. Ringo?

A. No, I have none whatsoever. I worked with Mr. Ringo for many months.

Q. I will show you the Government's Exhibit number 25, which is a comparative net worth statement of yourself as of December 31, 1947, and the same date in 1941, and I will call your attention to this item appearing thereon, [452] "Cash in vault."

(Testimony of Milton H. Olender.)

What is the figure for 1941? A. \$75,000.

Q. Does that refresh your recollection as to the information which appears in item 19 of the Government's Exhibit number 45?

A. No, it doesn't.

Q. I am going to show you again, Mr. Olender, the Defendant's Exhibit number P which is the partnership return for 1946 including the schedule A attached thereto. You have testified that the schedule, I believe, is a duplicate original prepared by you?

A. Yes, sir.

Q. Where was it prepared, Mr. Olender?

A. In Oakland.

Q. When was it prepared?

A. In the early part of 1947.

Q. When you say it was prepared in Oakland, could you be more specific? Was it your place of business or—

A. Yes.

Q. At your place of business?

A. Yes, I believe so, or at home, either one.

Q. Either place? A. I am not sure.

Q. How many copies did you make? You stated that you had to make a number, if you recall. [453]

A. I don't remember specifically. I usually made a copy for each partner in the thing. As you notice, there are five or six names there—one for my mother, one for my sister, one for me, and one for my two cousins, and then one for the Government.

Q. I note that the schedule and the return were prepared on a typewriter?

A. Yes, sir.

(Testimony of Milton H. Olender.)

Q. Was that typewriter in your place of business or at your home?

A. Could have been in either place. I had two typewriters.

Q. Was the schedule and the return itself prepared on the same typewriter?

A. I don't know.

Q. Do you have any recollection?

A. I haven't the slightest recollection of where I did the return.

Q. Did you prepare the return and the schedule at the same time?

A. I might not have. I might have made the schedule much later.

Q. For approximately what period of time did the partnership own the Riverdale ranch?

A. That goes back prior to this partnership. It was originally [454] owned by my father and my uncle, the original Olender partnership, J. and S. Olender.

Q. When did this partnership acquire the Riverdale ranch?

A. Mr. Drewes, this isn't actually a partnership. I don't know what you would call it. It is a joint tenancy or ownership in common, or something of that sort. But two of the owners of this property acquired their one-half interest—one-fourth each, the two daughters of S. Olender when he passed away, I believe, in 1933. Then in 1940 when my father passed away my mother originally had one-half of that, or we will say three-sixths, and I was

(Testimony of Milton H. Olender.)

given one-sixth and my sister one-sixth and my mother took one-sixth so that there were three-sixths on our side and three-sixths on the side of the other two.

Q. And when did the second partnership—we will use that term for want of a better one—acquire the Riverdale ranch?

A. When the estate of my father was finally probated.

Q. Which was in 19—— A. '42, I believe.

Q. Mr. Olender, did you take depreciation on the Riverdale ranch during the time that was held by the partnership?

A. There was nothing to depreciate.

Q. Did you ever take depreciation as a deduction on the [455] returns?

A. In the early years of the partnership when it was owned by my father there was bonds and certain properties which finally collapsed, and were gone when we acquired the property. There was nothing but land.

Q. I show you, Mr. Olender, Government's Exhibit number 24 for identification, particularly with respect to Exhibit 7, Schedule A. You testified this morning, Mr. Olender, that that schedule, represents gifts from your mother to yourself, is that correct?

A. Yes, sir.

Q. And I note that the schedule is entitled, "Withdrawals from savings accounts in Fresno." What is meant by that, Mr. Olender?

A. That is where the funds came from.

(Testimony of Milton H. Olender.)

Q. From what savings accounts in Fresno?

A. She had two savings accounts in Fresno.

Q. Where were they?

A. One in the Bank of America, one in the Security First National Bank.

Q. And where, for example, in the first item where the date is shown as February 3, 1942, and the amount of \$1,000, does that mean that there was a withdrawal from one or the other of those two banks on that date?

A. Yes. [456]

Q. And in that amount?

A. Yes.

Q. And on March 31, 1943, your mother withdrew \$1,000 as a gift to you?

A. Yes.

Q. And withdrew it from one or the other of those two banks?

A. Yes.

Q. Similarly on January 6, 1944, she withdrew \$2,000 from one or the other of those two accounts and gave it to you?

A. Yes, sir.

Q. What disposition did you make of those funds, if you recall?

A. Some of it I put in my safe deposit box, some I used in other ways.

Q. Well, now, you state that you put it in your safe deposit vault. In what form?

A. Currency.

Q. She made the withdrawal and gave it to you in currency?

A. Yes.

Q. On July 5, 1944, did she withdraw \$2,500 from either one of those two accounts and give it to you?

A. It says so in there.

Q. Was that true? [457]

A. Yes.

(Testimony of Milton H. Olender.)

Q. And on December 5, 1944, she withdrew \$1,000? A. December 15.

Q. I beg your pardon, you are correct.

A. Yes.

Q. And on January 2, 1945, she withdrew \$3,000 from either one of those two accounts and gave it to you in currency? A. Yes, sir.

Q. In every case it was in currency?

A. Yes, sir.

Q. And you put it in your safe deposit vault or made some——

A. I don't know where I put it. I put it somewhere.

Q. Other than your safe deposit vault, where would you have put it?

A. I might have deposited it in one of my accounts, I am not sure.

Q. Would your bank records show deposits of those sums as of any of those dates?

A. They may or may not, I don't know.

Q. You could examine your records for us, couldn't you, and let us know?

A. Yes, I could. I haven't.

Q. But there is no question in your mind that with respect to Exhibit 7 which is in front of you as to each one of [458] those amounts your mother withdrew that sum from either one of the two banks which you have designated on the dates shown and gave the money to you in cash?

A. I am not positive that the money that came out of those banks was given to me. She may have

(Testimony of Milton H. Olender.)

taken money those same dates from some other place, but she definitely withdrew that amount of money on those dates either from the bank or some other bank and gave the money to me. But there are positive withdrawals on that date, and I checked with my mother to make sure they are correct.

Q. There are positive withdrawals on each one of those dates? A. Yes.

Q. And the money was given to you?

A. Yes.

Q. Mr. Olender, I will show you the Government's Exhibit number 24 which again consists of your comparative net worth statements as of December 31, 1941, and 1947, and I will call your attention to the item appearing in 1947, "Single premium life insurance policy, \$15,833.46," and you will note that there is an asterisk there, and down below the following appears, "Personal check to the Bank of America, dated June 5, 1945, for \$15,833.46," the amount paid for the policy. Then the following, "Check number 2396 for \$15,000 transferred from the business bank account to [459] the personal bank account of Milton Olender and deposited in his account for this transaction on June 4, 1945." Do I understand that, Mr. Olender, to mean that of the \$15,833.46, which was paid for that policy, you took \$15,000 out of your business account and deposited that sum in your personal account, is that correct?

A. To the best of my knowledge, it is.

(Testimony of Milton H. Olender.)

Q. Then how did you pay for the policy? That doesn't appear. Let me rephrase that to help you along here. I understand that in explanation of that item you have put down here that check number 2396 in the amount of \$15,000 was taken from your business account and put in the personal account for the purpose of acquiring that policy. Now, how did you pay for the policy?

A. I am not sure of this. I believe that I purchased a cashier's check with that \$15,833.46. A personal check was issued, and a cashier's check was purchased for it, I am not sure.

Q. Your best recollection is that you drew another check on your personal account and with that you purchased a cashier's check, is that your testimony?

A. I don't know just how this thing—it is a little mixed up here. The check from my business was first put in my personal account to make up that sum, and then a check from my personal account was issued, and, I believe, to the Bank of America, I am not sure, and they issued me a [460] cashier's check which I tendered to the New York Life Insurance Company.

Q. Is that to the best of your recollection?

A. That is the best of my recollection.

Q. Why didn't you just draw a check on your personal account payable to the insurer?

A. I don't know.

Q. Mr. Olender, you testified this morning that you received from your mother-in-law, Mrs. Foote,

(Testimony of Milton H. Olender.)

the sum of \$2,500? A. That is right.

Q. When did you receive that money?

A. In 1945.

Q. Why was that money given to you by Mrs. Foote?

A. For a very specific purpose.

Q. I recall your so testifying this morning. What was the purpose?

A. For her grandson to purchase his home with.

Q. And how long did you hold that \$2,500?

A. Oh, a few months after she passed away.

Q. And when was that?

A. She passed away in August of 1945.

Q. And you received the money shortly before her death?

A. Some time before her death, yes.

Q. What did you do with the money? [461]

A. I kept it until December, and then deposited it with some other funds in my wife's bank account. I opened the bank account with that money.

Q. And you say it was for the purpose of purchasing a home for your——

A. For a down payment.

Q. For her grandson?

A. For her grandson and my wife's son.

Q. Would that have been your——

A. My stepson.

Q. I was about to ask you whether it was your son or your wife's son by her earlier marriage. During what period of time did Mrs. Foote live with you?

A. From 1924, the date of my marriage, until

(Testimony of Milton H. Olender.)

about 1938 or '9, I am not sure of the last year. She lived with me constantly except for short trips to visit some of her other daughters.

Q. Where did Mrs. Foote go at the time she left your home in 1938?

A. Mrs. Widrin, her daughter, who appeared here as a witness, purchased a home for her in Fresno in one of those years, 1938, '9, '40.

Q. Mrs. Widrin?

A. I am not sure of the year. I know Mrs. Widrin purchased a home for her, but when, I don't know. [462]

Q. State, if you know, did Mrs. Foote live there alone thereafter?

A. Yes, but her daughter, another daughter, lived right next door to her.

Q. In what form did you receive the \$2,500, Mr. Olender? A. Currency.

Q. Where were you when she gave you the currency? A. In Oakland.

Q. I mean specifically. Was it in your home or—

A. I don't remember, I believe in my home, yes.

Q. Did you give that sum of \$2,500 subsequently to your wife to deposit in her account, or did you do it? A. I believe I did it.

Q. I will show you the Government's Exhibit number 15 which is the stipulation admitted in evidence in this matter and I call your attention particularly to the second page under, "Cash in banks," the item, "Mrs. Betty Olender," and for the years

(Testimony of Milton H. Olender.)

1944, nothing; 1945, \$5,000, and for the year '46, \$10,070.06. A. Where is it?

Q. It is right here, \$10,070.06. There has been testimony you will recall, that that particular bank account was left off the net worth statement submitted to the Bureau of Internal Revenue by yourself or your agents, is that correct? [463]

A. That is correct.

Q. Do you remember, Mr. Olender, discussing that particular account to which I have called your attention on or about the 18th of October, 1948, in the presence of Mr. Whiteside and Mr. Root in Mr. Root's office in Oakland, California?

A. I remember I had a conference in there with them.

Q. And at that time and place do you remember telling Mr. Whiteside and Mr. Root that you received \$3,000 from Mrs. Foote in order to enable her to qualify for old age benefits?

A. I never said that.

Q. And that you put that sum of \$3,000 in your safe deposit vault and that following the death of Mrs. Foote you put that sum of \$3,000 in Mrs. Olender's account, Mrs. Betty Olender's account, that is your wife. Did you at that time and place and in the presence of those persons make those statements?

A. Not that first one. I don't remember about the second, certainly nothing about Mrs. Foote's pension.

Q. Mr. Olender, state if you know, whether your

(Testimony of Milton H. Olender.)

wife, Betty Olender, made a sworn statement to the Fresno County Department of Public Welfare in connection with Mrs. Foote's application for old age benefits?

Mr. Hagerty: If your Honor please, this is traveling far afield apparently on a collateral matter of impeachment. I am going to object to it being incompetent, irrelevant [464] and immaterial. Whatever was done outside here is not binding upon this defendant.

The Court: Well, did he know? The question is did he know of the filing with the Welfare Board of the documents or any applications made by your wife on her behalf?

The Witness: I know that Mrs. Foote was ultimately on pension from the State of California, but I don't remember whether my wife signed that or not. She might have.

Q. (By Mr. Drewes): I asked you, Mr. Olender, whether you had recollection of a conference which took place on October 18, 1948, in the offices of Mr. Root? A. Mr. Root alone?

Q. At which conference Mr. Whiteside was present?

A. I don't know if that was the date. I know I had a conference at one time or another.

Q. Do you recall if then Mr. Monroe Friedman was present?

A. He might have been, I don't remember.

Mr. Drewes: I see that it is four o'clock, your

(Testimony of Milton H. Olender.)

Honor. This is an appropriate place for my examination in which to recess.

The Court: We will take the afternoon adjournment, ladies and gentlemen, with the same admonition not to discuss the case or form an opinion until it is finally submitted to you.

(Thereupon Court was adjourned until Wednesday, September 24, 1952, at 10 o'clock a.m.) [465]

September 24, 1952—10:00 A.M.

The Clerk: United States of America vs. Olender on trial.

Mr. Lewis: Your Honor, we have excluded witnesses, but I have talked with Mr. Drewes, and we have our accountant in the courtroom and he says it is all right.

MILTON H. OLENDER

the defendant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Olender, will you restate your name for the record?

A. Milton Olender.

Cross-Examination

(Resumed)

By Mr. Drewes:

Q. It has been called to my attention that yesterday I asked you if you had filed gift tax returns

(Testimony of Milton H. Olender.)

with respect to the \$5,000 per year which you have testified your father put in the vault at Fresno between the years 1940 and 1950. I meant to state between the years 1930 and 1940.

A. The answer is the same.

Q. The answer is the same. And the answer as to your father having filed, your answer is the same? A. Yes. [466]

Q. Mr. Olender, I show you again the defendant's Exhibit P in evidence which has been identified as the partnership return for the year 1946, together with the schedule which you have identified. With particular reference to the sale of the Riverdale Ranch property, Mr. Olender, for what price was the ranch sold? A. \$20,000.

Q. And with particular reference to the schedule which you have before you, what is the cost basis shown? A. \$20,000.

Q. And what interest did you have in that property? A. One-sixth.

Q. Well, I asked you yesterday, Mr. Olender, if it were not true that you had taken depreciation on that property and you answered that you had not. Is your answer still the same?

A. Do you mean during the time that I owned the property?

Q. During the time that you had a one-sixth interest in 1945, '44, '43, '42?

A. I have no knowledge of any depreciation being taken. I have no remembrance of it.

(Testimony of Milton H. Olender.)

Q. You testified that you prepared the returns, your own returns, for those years?

A. All the depreciation would have been shown on my own returns.

Q. I now hand you the Government's Exhibits 1, 9, 7 and 5, [467] which are your returns for the years 1942, '43, '44 and '45. I will ask you to examine them with particular reference to the schedules thereon and state if it is not a fact that in each year depreciation is shown as a deduction for the Riverdale Ranch property?

Mr. Hagerty: I will object to that, your Honor, on the grounds that the returns speak for themselves.

The Court: Overruled.

Q. (By Mr. Drewes): You will find the schedules on the last page in most instances, Mr. Olender.

A. There is a small item of depreciation on there.

Q. In each year?

A. I have only looked at one.

Q. Please examine the others. You will find the schedules in approximately the same place in each return, and I think you will find the items approximately the same in each return.

A. There is a depreciation item of \$72 each year.

Q. Thank you. You have testified that the Riverdale Ranch was sold for \$20,000. You had a one-sixth interest there.

A. That's correct.

(Testimony of Milton H. Olender.)

Q. That one-sixth interest would represent a value of \$3,666 to you, is that correct?

A. I am not sure of that figure. It was one-sixth of \$20,000. [468]

Q. One-sixth of \$20,000? A. Yes.

Q. All right. You testified that in connection with your work as accountant for your father's estate you were engaged primarily in valuation work, and that your efforts consisted primarily of conferences with the inheritance tax appraisers for the purpose of establishing the value of real property for estate purposes, is that correct?

A. As far as I remember.

Q. I now show you the Government Exhibit No. 46 in evidence, which is the estate tax return filed in the matter of your late father's estate, and call your attention primarily to Schedule A, Real Estate, Item 3, and ask you to state the value shown thereon with respect to the item?

A. \$3,950 for an undivided one-half interest.

Q. In what property?

A. In the Riverdale Ranch property.

Q. \$3,950 for one-half interest. Therefore the entire property would be valued at twice that figure or \$7,900, is that correct?

A. No, sir, it would not.

Q. It would not be? A. No, sir.

Q. You had a one-third interest in that?

A. One-sixth. [469]

Q. You had a one-third interest in that one-half, did you not? A. Yes.

(Testimony of Milton H. Olender.)

Q. What does the one-third interest in that one-half represent, according to that evaluation?

A. Thirteen hundred some odd dollars.

Q. \$1,316.66, is that correct? A. Yes, sir.

Mr. Drewes: Mr. Clerk, would you distribute to the jurors the charts that the defendant prepared yesterday?

(Documents were distributed to the Jury.)

Q. (By Mr. Drewes): Mr. Olender, as I understand your testimony on direct examination you purchased sailors' suits from one George Goodman early in 1944, is that correct?

A. Through Mr. Lewis Leavy.

Q. Mr. Leavy? A. Yes.

Q. And you paid therefor \$20,550, is that correct? A. That's correct.

Q. How was that payment made, Mr. Olender, in what form? A. In cashier's checks.

Q. How many were there?

A. I don't know. There were several, maybe five, six, seven or eight.

Q. And where did you buy those cashier's [470] checks?

A. In the Bank of America, 12th and Broadway, in Oakland.

Q. Mr. Olender, I have in my hand five sheets of paper, to which are affixed three applications for cashier's checks, and nine checks, all cashier's checks, drawn on the Bank of America, each payable to George Goodman, six of which are in the

(Testimony of Milton H. Olender.)

amount of \$2,250, and three of which are in the amount of \$2,350.

I will ask you to examine these and ask you—examine them, please. A. Yes, sir.

Q. You have examined them? A. I have.

Q. I ask you if those refresh your recollection, if those appear to be copies of the nine checks which you sent to George Goodman in payment for the suits which you purchased from him in 1944 as you heretofore testified?

A. That's eight years ago, Mr. Drewes. They may be. I don't know if they are. But I couldn't be sure.

Q. Of the three applications, Mr. Olender, two, one dated January 10, 1944, and one dated January 22, 1944, bear signatures of the purchaser. I will ask you to examine those and tell me if those signatures appear to be your own?

A. They are. I am not denying these are mine. I am merely stating I don't know whether these are the checks or not. I applied for them. [471]

Q. Thank you. Where did you get the \$20,550 with which you purchased the Goodman suits, Mr. Olender?

A. I believe from my safe deposit box.

Q. Did you deposit that sum to your business account? A. I did not.

Q. You used that sum to purchase cashier's checks? A. I did.

Q. Why, Mr. Olender, did you not simply deposit the sum in your business account and send

(Testimony of Milton H. Olender.)

Mr. Goodman the check for the purchase of the suits in the ordinary way?

A. There was no assurance that I was going to get those suits whatsoever, and if I had given Mr. Goodman a check on my store he wouldn't have accepted it. He wanted cashier's checks. It was requested.

Q. Did you purchase cashier's checks for the purpose of keeping your name off the transaction?

A. No, sir. My name and the name of the store was on there.

Q. Did you enter those purchases on your books, Mr. Olender? A. I did not at that time.

Q. Why did you not?

A. Because when the merchandise arrived, it was unsatisfactory and I wanted to return it immediately.

Q. When did the merchandise arrive, to the best of your [472] recollection?

A. I am not sure. They arrived in several shipments. I believe during the months of February and March, maybe even later.

Q. At the time that you purchased the goods from Mr. Goodman did you know that the goods were going to be unsatisfactory?

A. I did not. I did not know I was going to get the goods.

Q. Mr. Olender, did you receive invoices from Mr. Goodman covering these purchases?

A. I did not.

Q. You received none at all?

(Testimony of Milton H. Olender.)

A. None at all. I demanded them but I could not get them.

Q. Mr. Olender, what other purchases did you make of sailor suits in the year 1944?

A. From whom?

Q. From anyone.

A. I believe there were some suits bought from the Dorfman Hat & Cap Company.

Q. Mr. Olender, I am going to hand you defendant's Exhibits H, I, J, K and L in evidence, as your books of account, and ask you to refer to them and state what purchases of sailor suits were made by you in the year 1944 as reflected by your books?

A. I wouldn't know where to find them, Mr. Drewes. [473]

Q. You don't know where in your books?

A. No, sir, I don't. Sailor suits transactions would not be reflected in there. Merely the house that I bought from, and I bought hundreds of invoices from Dorfman, hundreds of invoices from many accounts.

Q. All I want to know, what purchases you made of sailor suits in 1944? A. Well, I can't.

Q. Can't you tell me that?

A. I cannot tell from my books. I cannot tell from my books. I can tell from my invoices, not from my books.

Q. Didn't you enter your purchases in your books?

A. I did not do any entering in my books of any kind. Not a single line.

(Testimony of Milton H. Olender.)

Q. Were they entered in your books by someone else? A. Yes.

Q. Are you so totally unfamiliar with the books in front of you that you can't turn and tell me what sailor suits you bought in 1944?

A. No, I cannot. No. There is no way to identify them from my books. Only from my invoices.

Q. Where are your invoices?

A. In my store.

Q. You have the invoices in Court?

A. I can. [474]

Q. Do you have them in Court?

A. No, I haven't been asked to bring them in.

Q. Did you buy any sailor suits from Mr. Goodman in 1944 other than those to which you have testified? A. I did. I bought \$1,380 worth.

Q. How many suits were those?

A. I don't know. It's on the invoice. I don't remember.

Q. What suits did you buy in 1945 to the best of your recollection?

A. Why, I bought all the Saraga suits that have been in testimony. I don't know what others. I don't remember.

Q. Do you recall buying any sailor suits from Seagoing Company in 1945?

A. Yes, there is one invoice there, \$9,000, from Seagoing, I believe.

Q. The purchase from Saraga in 1945 was \$22,775? A. To the best of my knowledge.

Q. Is that correct? A. Yes.

(Testimony of Milton H. Olender.)

Q. I believe that has been testified to?

A. Yes.

Q. In 1945 did you make a purchase of sailor suits from one Joe Asman? A. Who?

Q. Joe Asman—(spelling)—A-s-m-a-n. [475]

A. The name doesn't register with me.

Q. How much did you pay for the suits that you brought from Goodman?

A. The price was \$25.

Q. But two hundred of those suits, I understand, were sold to Mr. Lerman?

A. Without my knowledge.

Q. By Mr. Leavy? A. Yes.

Q. Is that correct? A. Yes.

Q. And 280 suits were sold by Mr. Leavy for \$7,000? A. Approximately that.

Q. To whom were those suits sold?

A. I have no idea.

Q. Do you have any record at all?

A. No.

Q. The proceeds of the sale of the suits to Mr. Lerman in the amount of \$5,000 were credited to your capital account? A. That's correct.

Q. Is that correct? A. Yes.

Q. And then, if I recall your testimony, 342 suits were picked up in inventory in 1945, is that correct? A. I believe it was 322. [476]

Q. Didn't you testify that it was 342 but 20 of them were sold?

A. Yes, the statement here says that 322 suits were placed in inventory.

(Testimony of Milton H. Olender.)

Q. Why did you credit your capital account in the amount of \$5,000 with the proceeds of the Lerman sale?

A. Because I needed it in my business.

Q. Did your crediting the capital account, the proceeds of that sale, have any reference to the source of the money? A. No.

Q. Did you consider it as a new contribution, new capital contribution?

A. I don't know what I considered it as.

Q. It was capital which theretofore had not been in your business? A. That's right.

Q. Therefore you credited the capital account?

A. That's correct.

Q. Is that correct?

A. Credited it to my capital account.

Q. Did you credit your capital account when you picked up the 342 suits in inventory?

A. I don't know.

Q. Will you refer to your books and see if there is a credit to the capital account? [477]

A. I wouldn't know where to look for it.

Q. You can't find that in the books? You are so completely ignorant of the context of your books that you can't turn to them and find out for me whether or not you credited the capital account with the 342 suits, is that correct?

Mr. Hagerty: Just a moment—just a moment. I will object to that as being argumentative, your Honor. Move to strike it.

Mr. Drewes: Your Honor, this man has testified

(Testimony of Milton H. Olender.)

that he prepared his own returns for a number of years, his mother's returns, returns for Simmons Company, for which he was paid, he has negotiated evaluations of property, he has filed an affidavit in which he said he has done much auditing over the years, he is a successful business man by his own characterization.

The Court: Will you turn to your capital account?

A. I wouldn't know where to look.

The Court: He said he wouldn't know where to look for the capital account. That is his answer.

The Court: Or the investment account.

A. There are forty pages of it.

The Court: Would you find it in your investment or capital account? This may simplify the question, at least I am not intruding on the examination, but to simplify it in my mind, in taking 322 sailor suits into your inventory, [478] would you not effect a journal entry in order to take it in your books?

A. I didn't, not to my knowledge.

Q. Ordinarily in accepted accounting practice, would you not, in order to take 322 sailor suits into your book accounts, effect it through a journal entry?

A. You might. I don't know. I don't know enough about bookkeeping to know that.

Q. (By Mr. Drewes): Let me ask you this question, if the receipt of \$5,000 is from the proceeds of the Lerman sale represented additional capital contribution to your business, as you have just testified, wouldn't the picking up of 342 sailor

(Testimony of Milton H. Olender.)

suits equally represent a capital contribution to your business?

Mr. Hagerty: Object to the question.

Q. (By Mr. Drewes): To be credited accordingly.

The Court: The objection is overruled.

A. Will you repeat that question?

Mr. Drewes: Let me put it this way.

If the \$500 received from the proceeds of the Lerman sale represents an addition of new capital——

The Court: \$5,000.

Mr. Drewes: I beg your pardon?

Q. (By Mr. Drewes): \$5,000 represents the capital contribution of new capital to your business to be credited to your [479] capital account, wouldn't the acquisition or picking up of 342 sailor suits also represent additional capital contribution to your business to be handled the same way?

A. It might. I am not enough of an accountant to know.

Q. Now as I understand your testimony, Mr. Olender, you credited the 342 suits——

A. 322.

Q. It is my understanding that you—let's be sure what we are talking about here. It is my understanding of your testimony that after the sale of the \$7000 worth of suits by Leavy and after the \$5000 sale to Lerman you picked up the rest of the suits in inventory which was 342?

A. It was 322.

(Testimony of Milton H. Olender.)

Q. And you sold 20 in the business, is that correct? A. 322 were left, 20 were sold.

Q. All right. Now we are talking about the same thing. It is my understanding that you picked up the 322 suits in your inventory as of the 1st of January, 1946, is that correct?

A. I believe so.

Q. And that was approximately a year after you acquired the suits? A. That is correct.

Q. May I ask you why you did not pick up those suits in your inventory as of the beginning of [480] 1945?

A. Most of them were sitting in my basement as I had received them and I just let them sit there waiting the ultimate outcome of Mr. Leavy's transactions, trying to return them.

Q. Your answer to my question is they were just sitting there?

A. They were just sitting there.

Q. I will ask you the question again. Why didn't you pick them up on the inventory?

A. Because it was still an unsettled item.

Q. In what respect was it an unsettled item?

A. Mr. Leavy was going to get me either new suits or the money for those suits.

Q. Why did you pick them up then in the subsequent year rather than in the first year?

A. Because all of the transactions happened then. I was in the spot where I had to put them in.

Q. Will you explain that, what do you mean by

(Testimony of Milton H. Olender.)

that, that you had to pick them up, that you were in a spot?

A. I had nothing—I had the 200 suits of Mr. Goodman—Mr. Lerman's entered in my books. I had the other transactions of Saraga, and those were left, and Mr. Leavy said, "That's all I can do for you. There's no—no more I can get rid of."

Q. Will you state again, Mr. Olender, why Mr. Leavy undertook [481] to sell these Goodman suits for you?

A. Because he had been the one who had purchased them for me and had promised me faithfully that they would be small sizes.

Q. And that proved not to be the case?

A. Correct.

Q. It is your testimony that they were primarily large sizes? A. They were all large sizes.

Q. They were all large sizes. And Mr. Leavy undertook to sell them for you at cost?

A. That's correct.

Q. Which was—your cost was what?

A. \$25.

Q. Do you have anyone in your establishment who did alterations for you? A. No, sir.

Q. Did you have anyone, any tailor on a contract basis or on the basis who would come in and do the work for you? A. No, sir.

Q. Anyone to whom you would refer your customers for that work?

A. There were several tailors in the neighbor-

(Testimony of Milton H. Olender.)

hood and the boys went to whoever they wished to go to.

Q. You recommended that they go to—— [482]

A. I told them where each one was.

Q. What are those tailors' names?

A. I don't remember the names. One was called Navy Joe, one was Mike, and then there was one around the corner, a Mr. Bernstein, I believe.

Q. Do I understand then that if a customer, say a sailor came in and tried on a suit, if it didn't fit, you would—you were unable to alter it for him?

A. That is correct; I had to send him to a tailor for the alterations.

Q. And did you include that in the purchase price of the suit?

A. Only the shortening of the pants. Sometimes they wanted a zipper put in, which ran two, three, four dollars, or they would want specific things which are not ordinary, and those things they had to pay for. Shortening of a blouse or things of that sort, you don't—you just don't fit them that way.

Q. Was it ever necessary to cut down the suit, cut down the blouse, take in the waistline?

A. Well, when I said "shorten the pants," that includes taking in the waistline. The pants had to fit. But the blouse, we don't touch at all. No work was done on the blouse that we paid for.

Q. Do I understand that the customer just took the suit [483] over his arm, in the box, and went off to a tailor? A. That's correct.

Q. And that was the end of the transaction of the suit, as far as you were concerned?

(Testimony of Milton H. Olender.)

A. After he paid for it.

Q. He paid for it and took the suit with him?

A. That's right.

Q. And your understanding with him was that if he wanted any tailoring he could just go over to the tailor?

A. Outside of those things which I allowed him the deductions for. He paid for the rest.

Q. You still operate on that basis?

A. I still operate on the same basis. There is a tailor right next door to me now and he now comes into my store and does the measuring up.

Q. How long has he done that for you?

A. He has only been there a year. This last year.

Q. What is his name?

A. He is the Mike who used to be around the corner.

Q. What is his name?

A. I don't know his last name at all. Just Mike. Mike the tailor.

Q. He just comes in your store?

A. He is right next door to me.

Q. You don't know his last name? [484]

A. No, I don't. It's an Italian name, a rather long name, that I never heard. I never heard it.

Q. What is his address?

A. 1024 Broadway.

Q. Who did the work before Mike did the work?

A. Well, the last several years it's been practically none. I just sent them around to any tailor.

(Testimony of Milton H. Olender.)

I might explain to you, Mr. Drewes, the reason I had no tailor in the store, there was a tailor in the building and they would not permit me to have one in my business.

Q. Did the tailor in the building do the alteration work for you?

A. Some of it—not for me. For anybody.

Q. It is true, is it not, Mr. Olender, that in a given assortment of sailor suits it would be more advantageous if they tended to be large than if they tended to be too small? A. No.

Q. Is it not true that you can cut down larger suits more readily, whereas it is—to fit your customers—whereas it is virtually impossible to expand a suit that is too small, isn't that true?

A. You wouldn't like to have a 44 cut down to your size, would you, Mr. Drewes?

Q. I would rather have that than try to wear a 32.

A. We didn't cut them down that way for our boys. [485]

Q. Mr. Olender, you testified that you received no invoices from Mr. Goodman?

A. Just one.

Q. I thought you testified that you received——

A. The \$1380 purchase which I made, I received an invoice. I told you that.

Q. For how much? A. \$1380.

Q. \$1380? A. Yes, sir.

Q. Was that a purchase apart from the original transaction? A. Yes.

(Testimony of Milton H. Olender.)

Q. Was that entered in your books?

A. Yes, sir.

Q. How do you know?

A. I still have the name of Mr. George Goodman.

Q. How do you know it is entered in your books?

A. Because I have seen it. It was called to my attention by the Internal Revenue Department.

Q. Having seen that, could you look at your books and find out what other purchases are entered?

A. There are no other sailor suit houses.

Q. Pardon me? I didn't understand your answer.

A. Mr. Goodman represented houses for sailor suits, and my only transactions with Mr. Goodman were for sailor suits. [486] The other houses which I bought merchandise from carried hundreds of items which I bought. I cannot tell from my books here which one of those invoices were sailor suits. But I gave to Mr. Blanchard 25 or 30 invoices of the Dorfman Hat Company which designated sailor suits on them.

Q. I am going to show you defendant's Exhibit N for identification, which is the inventory. Calling your attention particularly to item of 322 serge suits. I am going to ask you, Mr. Olender, if there is anything in that record as it stands there which enables you to identify those suits as coming from George Goodman?

A. There is.

Q. What is it?

(Testimony of Milton H. Olender.)

A. I know that they were George Goodman.

Q. I didn't ask you that.

May that be stricken as unresponsive?

The Court: That may go out.

Q. (By Mr. Drewes): Will you answer my question? I didn't ask you if you knew. I asked you if there was anything in that record as it sits before you that ties those suits into the Goodman transaction.

A. Not the name George Goodman on them.

Mr. Drewes: May that be stricken as unresponsive?

The Court: Yes, that may go out.

Mr. Drewes: Will you answer the [487] question?

A. Would you repeat the question, please?

Q. Is there anything in the record which is now before you which identifies those 322 serge suits as having come from George Goodman?

A. I don't know.

Q. Well, look at it, Mr. Olender. Examine it carefully.

A. Well, it definitely identifies it in my mind as George Goodman's suits.

Mr. Drewes: May that be stricken as unresponsive?

The Court: That may go out.

Q. (By Mr. Drewes): Examine that record, Mr. Olender, in front of you. Is it not——

Mr. Hagerty: If your Honor please, I will object on the ground the record speaks for itself.

(Testimony of Milton H. Olender.)

The Court: Overruled.

Mr. Hagerty: This man's conclusion from the record is immaterial.

The Court: Overruled.

Q. (By Mr. Drewes): Now the record is in front of you. Will you look at it, Mr. Olender, and will you tell me if anything appears in that record which identifies those suits as having come from George Goodman?

A. There is no name on them.

Mr. Drewes: May that answer go out?

The Court: Yes, that may go out. [488]

Q. (By Mr. Drewes): Will you answer my question?

A. Well, I don't understand what you are driving at.

Q. I want to know if there is anything in that record which identifies those suits as coming from George Goodman?

A. There is nothing in this record that identifies anything as coming from anybody.

Mr. Drewes: That will do. May we take the morning recess, your Honor?

The Court: Take the morning recess, ladies and gentlemen. The same admonition to you.

(Short recess taken.)

Q. (By Mr. Drewes): Mr. Olender, did you buy anything else from Mr. Goodman in 1944 other than sailor suits? A. No, sir.

Q. And it is your testimony that you received no invoices from Goodman other than one?

(Testimony of Milton H. Olender.)

A. That's correct.

Q. And that invoice was the \$13,000?

A. \$1380.

Q. How do you know your price was \$25 if you have no invoices, Mr. Olender?

A. I received suits on the basis of that price. By the number of suits I received and the price. You just multiply the number of suits or divide the number, the price, by \$25, and it comes out the number of suits that I received. [489] I kept track of the suits that I received at the time.

Q. Is the price \$25 with respect to that \$13,800? A. \$1380.

Q. Yes.

A. No, I believe the price was lower on those.

Q. What was the price on those?

A. I don't remember. If you will bring the invoice I could tell you. I don't remember it.

Q. Mr. Olender, the only invoice you ever received was that invoice covering the \$13,800 shipment? A. \$1380.

Q. \$1380. Do you remember approximately when that purchase was made?

A. No, I don't. Shortly after this other one.

Q. Mr. Olender, I show you two photostatic copies of documents, one dated June 8th, one dated June 14th, 1944. They appear to be addressed to you, from George Goodman Sales Agency. And I ask you to examine those? A. Yes.

Q. Have you examined them? A. Yes.

Q. Having examined those documents, do they

(Testimony of Milton H. Olender.)

refresh your recollection as to having received the originals thereof? A. No, sir.

Q. You remember ever receiving them [490] before?

A. I never have seen them before.

Q. Mr. Olender, as to the suits which you purchased from Goodman, to which you have testified, were any of them paid for by you at the price of \$23?

A. I don't know what that \$1380 invoice was for.

Q. You don't recall? A. I don't recall.

Q. Could the price have been \$23?

A. I don't know. It's on the invoice, if you have the invoice.

Q. I haven't the invoice, Mr. Olender.

A. The Government had it. I gave it to them.

Mr. Drewes: Do you have the invoice?

(Thereupon discussion between counsel out of the hearing of the reporter.)

The Witness: May I see those two photostats again (referring to photostats of Goodman invoices)?

Mr. Drewes: Of course, (handing to witness).

Q. Having examined them again, is your recollection refreshed? A. No, sir.

Q. You don't recall ever receiving the original of these invoices?

A. I never received them, no, sir.

Q. Mr. Olender, you stated in the course of your

(Testimony of Milton H. Olender.)

testimony [491] yesterday in response to a question put to you by the Court that your books of account would reflect the sale of 20 of the Goodman suits. A. I don't—

Q. Are you prepared to demonstrate where those sales appear in your books?

A. There would be no way to show that. My daily sales appear on my register and at the end of the day, if the suit were sold for \$35, that sale would be deposited with my regular sales. It would not say that it was a specific sale. All of my sales are on my register tapes and they would be deposited from there into the bank, and twenty of those suits went into my store register.

Q. Mr. Olender, at page 401 of the transcript of yesterday's testimony, beginning at line 9, Mr. Hagerty asked you this question:

“Q. Those were sales at retail in your store?”—with reference to the 20 suits—

“Q. Those were sales at retail in your store? The answer:

“A. Retail, yes. They were sold at retail.

“The Court: Those sales would show on your books?

“A. They will show in my daily sales.

“The Court: They would be reflected in your books of account here? [492]

“A. Yes.”

Now are you changing your testimony?

A. No, I am not changing it. It is just the same thing. I don't put specific items—I have no bills or receipts made out for each sale or any-

(Testimony of Milton H. Olender.)

thing. It is just rung up in the register and at the end of the day your sales total so much and they are definitely in the sales. They were not kept——

Q. I understand your testimony to be that your books do not reflect the sales of those 20 suits as such, is that correct?

A. Not—it doesn't show them specifically, but they are in there.

Q. You can't point to them? A. No.

Q. Mr. Olender, you testified on your direct examination that you were made trustee of the Olender Building, is that your testimony?

A. Yes.

Q. Was any public record made of your trusteeship, to your knowledge? A. Yes, sir.

Q. Where was that recorded?

A. In the County of Fresno.

Q. Pardon me?

A. The County of Fresno.

Q. The County Recorder's office? [493]

A. Yes.

Q. And you testified that your uncle and your brother—— A. Father.

Q. Pardon me. Your father and his brother gave you one of their two stores in Fresno which they operated before as a partnership, that you gave it back to them subsequently?

A. Yes, sir.

Q. State if you recall whether any public record was made of either of those transactions?

A. There was not.

(Testimony of Milton H. Olender.)

Q. Your father and your uncle were partners in the business which they then gave to you?

A. Yes.

Q. What was your uncle's name?

A. Samuel Olender.

Q. Does he have any children?

A. He has two children.

Q. Did he have children at that time?

A. Yes.

Q. I am going to hand you now, Mr. Olender, what purports to be a transcript of your record at the University of California. I am going to ask you to examine it for the purpose of refreshing your recollection. Will you look particularly at the subjects listed under the fourth year?

Mr. Hagerty: We have no objection, Mr. Drewes, if you [494] wish to put that in evidence.

Mr. Drewes: No, thank you.

Q. Have you examined it? A. Yes, sir.

Q. Will you state, having refreshed your recollection, will you state whether or not you took in your senior year, your fourth year, a course, "Economics 162, auditing"? A. I did.

Q. Did you take in your second year a course "Principles of accounting"? A. I did.

Mr. Drewes: No further questions.